The Central Law Journal.

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CURRENT EVENTS.

TWENTY-FOUR PAGES.—Our readers will perceive that in this number we furnish twenty-four pages of matter. We trust they will see in this a purpose on our part to divide with them the fruits of our prosperity. We carried this amount of matter during the first half of the year 1877, but were unable to maintain it, because our expenses were then out of proportion to our income. Our subscription list is now much larger than it then was, and our editorial corps is much more experienced and efficient. Despite the hard times and a little grumbling on the part of a subscriber here and there, we have gone steadily forward in a career of prosperity, and, we trust, of usefulness. Our able and esteemed contemporary, the *Albany Law Journal*, is quite right when it says that the new "Reporters" which are springing up all over the country cannot destroy such journals as the *Albany* and the CENTRAL. So far from this, these new publications will greatly add to our facilities for doing the special work for the profession which it is our office to do. Appreciating what we believe to be the desire of most of our readers, we shall, in the future, confine ourselves mostly to *technical* law, furnishing technical articles by able pens, and several select cases in each number, *annotated*. Do our patrons want us to discontinue our "Digest," or cut it down to a mere index of points, or conduct as at present? Do you want us to discontinue our department of "Current Events" and our "Jetsam and Flotsam?" Do you want us to suppress all matters of news relating to the profession,—to tell you nothing about the bar associations, the lawyers and judges who are promoted, or who die, or resign, or of great forensic contests, or movements in law reform? Do you want us to keep you in ignorance of everything but the reported case law which a hundred courts are grinding out? If you do, we will do it without extra charge. Let us hear from you.

HENRY R. SELDEN.—This eminent lawyer died in September, at Rochester, at the age of eighty. Our readers will remember him from his early reports of the New York Court of Appeals, and his small addendum of cases decided in that court called "Selden's Notes," but chiefly from his very learned and lucid opinions, which are contained in volumes 25 to 31 of the New York reports.

HON. SAWNIE ROBERTSON.—Gov. Ireland has appointed Hon. Sawnie Robertson, of Dallas, to fill the vacancy on the supreme bench of Texas, caused by the resignation of Associate Justice Charles F. West. Judge Robertson is but thirty-five years old and is said to be the youngest person who has ever enjoyed this honor in Texas except Judge Bell, who reached the same dignity at the age of thirty. Judge Robertson is not a politician, but has always addressed himself closely to his profession, and we understand that his appointment is received with much satisfaction in Texas.

A SENSIBLE VIEW.—The *New York Tribune*, referring to the report of the committee, at the recent meeting of the American Bar Association, on Delay and Uncertainty in Judicial Administration, puts forward the following sensible view: "The fact is that the evil as it exists is not one that can be legislated out of existence. The remedy lies, not in the making of new laws, but in the courts themselves. If all our judges, from the lowest to the highest courts, were as good as the best of them, the present difficulties, or the most serious part of them, would quickly disappear. A healthy, earnest, public sentiment on this subject should not only render the selection of unfit judges impossible, but should make itself felt in impressing upon those in judicial office the full obligation of their positions." The *Tribune's* rem-

edy, then, lies in an enlightened public opinion. The *New York Times*, on the other hand, dispairs of this remedy. It says: "The only enlightened opinion is professional opinion, and professional opinion is deprived of much of its value by the interest that lawyers have in the uncertainty and the delay of the law."

AN ADMIRABLE CHARGE.—The *Jefferson City* (Mo.) *Tribune*, for Sept. 9, published in full the charge of Mr. District Judge Krekel to the grand jury empanneled in the United States Circuit Court for the Western District of Missouri. It is one of the most lucid, well tempered and judicious papers of the kind which we have seen,—comprehensive without being too long, and terse and pointed without being too short. On the subject of the interference by striking railway employes with the carriage of the mails—a subject which has been emphasized by recent events in Missouri, the learned judge used the following language: "Under the constitution and acts of Congress the Federal Government has undertaken to provide mail facilities. For this purpose it has established post-offices over the whole of its territory and appointed postmasters and other agents to transact the business. It contracts with railroads, steamers, and employs other means to convey its mail. It protects these mails against any and all kind of interferences, and punishes those who violate the law and regulations regarding them. Interfering with mails, so as to cause delay in their transportation, however short in time, is punishable. This applies to railroads, steamers, stage coaches, carriers on horseback or on foot. If several combine or join in causing delay, all are guilty who participate in such illegal proceedings. The Act of Congress referring to obstructing the passage of mails, provides that 'any person who shall knowingly and wilfully obstruct or retard the passage of the mail, or any carriage, horse, driver or carrier carrying the same, shall be punishable by fine.' Ferrymen refusing or neglecting to carry the mail across any ferry are punishable by fine. A postal or other railroad car in which mail matter is conveyed falls within the meaning of 'carriage' as used in this Act. Our mails are now mostly carried by railroads, and the government enters into contracts with them for that purpose. These railroads employ large numbers of men and machinery to carry on their business, including the carrying of mail matter. Strikes occur on these roads, often seriously interfering with the conveyance of the mails. Employes of railroads engaged on trains carrying mail matter may, at proper times, quit work, and if, in consequence of their doing so, the mails are delayed, they do not thereby commit an offense against the laws of the United States. Strikers may induce their colaborers engaged on mail trains to join them under the limitations stated without committing an offense against the postal laws, though the consequence be the obstructing or retarding of the mail. But employes of railroads, as well as other persons, cannot improperly interfere with the instrumentalities usually employed and necessary for the conveyance of mails, be it carriers or machinery, without laying themselves liable. Nor is it any excuse that men or machinery used in carrying the mail is at the same time employed for other purposes. Mails could not be carried at the rates they are if special trains and instrumentalities had to be provided. To compel such employment by direct or indirect means would seriously interfere with our mail facilities."

CHIEF JUSTICE WAITE IN ENGLAND.—We clip the following from the editorial page of the *Law Times* (London): "The Chief Justice of the United States has been in London for a few days, having been the guest of Lord Bramwell, Lord Fitzgerald, Baron Huddleston and others. Such an announcement as this raises mixed feelings. In the first place, it is painful to reflect that we have been unable to give this high and honored personage a meet official welcome; in the second place, it is melancholy that he should have seen our legal machinery at its most scandalous season—that is to say, in the middle of the long vacation. Greater dignity belongs to the Chief Justice of the United States than to the corresponding judge in England. He presides over the Supreme Court of the United States, which is, as we learn from a contemporary, 'a Court of Ap-

peal exercising jurisdiction over the American Parliament itself,' (*par parenthese*, we knew not that the States boasted such an institution), 'in case it should overstep, as it has done upon occasion, the limits fixed by the Constitution.'" We have read considerable in the English law journals lately about the decline of legal business in England; but we had not supposed that the English bar were in such straits as not to feel able to give a free lunch to the chief justice of the greatest judicial tribunal in the world. If it was due to hard times it was excusable; if not, it was shabby. The Supreme Court of the United States has, for more than half a century, exercised the power of declaring acts of the Congress and of the State legislatures void when in conflict with the Constitution of the United States, which is the Supreme law of the land. From the foundation of our present Union, it has exercised the great office of settling the boundaries of Federal and State power. In these regards, its jurisdiction is far greater than that of the judicial branch of English House of Lords. In respect of its present *personnel* it is far superior to that body. The rambling oral judgments delivered by the law peers and lords of appeal will bear no comparison with the carefully matured and finished opinions delivered in our national Supreme Court. When Lord Coleridge was in Washington, he was invited to a seat on the Supreme bench,—an honor which, it is believed, had hitherto been accorded to no person not a member of the court. He testified his appreciation of it, we are informed, by taking a nap during the proceedings. It ought to be said in extenuation of this slip of the dear old lawyer, that he had lost much sleep in consequence of our perhaps too excessive hospitality,—an infliction which Chief Justice Waite seems not to have suffered in England.

NOTES OF RECENT DECISIONS.

CORPORATIONS. [STOCKHOLDER]. REMEDY OF STOCKHOLDER IN CASE OF FRAUDULENT INCREASE OF STOCK.—The case of the *Appeal of the Columbia National Bank*, as reported in the *Pittsburgh Legal Journal*,[1] is not very intelligible, probably for want of a clearer statement of facts. If it merely holds what the *syllabus* recites, that "complaint by a stockholder as to increase of stock, where the stockholder is himself only an owner of the increased stock, and notice had been given to the stockholders of the proposed increase, is of no avail," but that, "the Commonwealth might, if it chose, make, a successful protest against such action,"—it is intelligible enough. In giving the opinion of the court, Paxson, J., said: "The increased stock was issued for a consideration; the sufficiency of that consideration we are not called upon to inquire into in this proceeding. It was held in Pullman v. Upton,[2] that the State alone can raise the question whether the stock of a corporation had been properly increased. And there is an obvious distinction between shares which the company had no power to issue, and shares which the company had power to issue, although not in the manner in which, or upon the terms upon which, they have been issued.[3] Had the complainants been the holders of 1,000, or any number of shares of stock which the company had issued without authority, they might have had a standing to seek redress from the company in a court of equity, and the line of cases cited in which this principle is asserted, would have had some application. But this company had the admitted power to make the increase of stock; and for a mere irregularity in the mode of its issue, a holder of such stock has no redress against the company." But suppose a gaslight corporation, having a capital stock consisting of 1,120 shares, and having power, proceeding in a certain mode, to increase this capital stock by the issuing of 16,000 additional shares, proceeds to issue these additional shares, and sells 1,000 of them to me for full value, and swaps the rest of them for a quantity of wild land or for a piece of blue sky, am I not defrauded, and have I not a standing in a court of equity to have the swindle torn up by the roots, if I can get the parties to the swindle into court? Of course, if the stock so issued has been previously unloaded upon an innocent holder for value, I may be without redress as against him, and

[1] 16 Pitts. L. J. (N. S.) 20.

[2] Pullman v. Upton, 96 U. S. 328.

[3] Scovill v. Thayer, 105 U. S. 143, 149.

so the court hold in the case on which we are commenting. But when a gaslight company makes such an increased issue of stock, and swaps an amount of it of the par value of $373,000 for "wild lands," it is a case that deserves looking into; and although the Pennsylvania court may not, in the case as presented, have had the power to deal with it, it is to be regretted that an opinion was not written, or a statement of facts furnished, which places the decision of the court upon some intelligent basis.

AGENCY—THIRD PERSON PURCHASING PROPERTY OF AGENT WHEN LIABLE FOR CONVERSION.—In *Kohn v. Washer*,[4] lately before the Supreme Court of Texas, it appeared that a wholesale clothing-house in Chicago, employed a commercial traveller at a salary and commission, to visit retail houses throughout the country and solicit orders for their goods. They sent him out an assortment of coats, one hundred and ninety in number, valued by them in the aggregate at $1,425, to be exhibited by him as samples to retail dealers. He sold this lot of goods to a house in Texas for $360, representing that he was travelling for an Eastern house and had authority to sell the samples. Thereupon he left the country. The owners of the goods brought an action to recover their value. The trial court instructed the jury in substance that if the sale of the samples was embraced within the real or apparent scope of the agent's authority, the owners would be bound by the sale and could not recover. This instruction, while admitted to be correct in the abstract, was held to be erroneous in its application to the facts of the case. In giving the opinion of the court, Watts, J., said: "Under the circumstances, the extent of his authority was to exhibit the goods as samples and not as merchandise for sale, and no apparent authority to sell the samples would exist or arise out of the nature of the agency. It has been held that a salesman authorized to sell goods on a credit, has no authority to subsequently collect the price in the name of the principal, and a payment to him will not discharge the purchaser, unless some authority to collect beyond what is implied in the mere power to make the sale is shown.[5] In our opinion the evidence did not authorize the charge, and the evidence upon the other issues is such, that this error may have been material."

[4] 1 Tex. Ct. Repr., 374.

PLEADING. [EJECTMENT]—EQUITABLE DEFENSE. In *Arguello v. Bours*[6] the subject of equitable defenses in actions of ejectment is thus considered by the Supreme Court of California, speaking through McKinstry, J.: "Under our system of practice, a defendant may plead, as a defense to 'ejectment,' that he is in possession under a contract of purchase, the conditions whereof have been fully performed on his part; in other words, that he is in possession under a contract which gave him the right of possession, and that he is entitled to retain possession as against the bare, naked title of his vendor, which the vendor holds disconnected from any real interest. A perfect equity, united to the possession, is, under our system, equivalent for all purposes of defense, to a legal title.[7] A vendee in possession under an executory contract, the conditions of which have been performed on his part, may avail himself of his equitable title as a defense to an action of ejectment brought against him by the holder of the legal title.[8] A mere equitable title to land, if of such a character as in equity entitles the holder to the possession, is a sufficient defense to an action for the possession brought by the holder of the legal title.[9] But whether a defendant relies upon his equities merely as a defense to the ejectment, or alleges them in a cross bill, and bases on them a prayer for equitable relief, the facts must be fully set forth in the answer, as fully as it would be necessary to allege them in the stating part of a bill in equity, praying a decree for a conveyance of the legal title.[10] In Kenyon

[5] Seiple v. Irwin, 30 Penn. St., 513; Low v. Stokes, N. J. (Law), 249.

[6] 7 W. C. Repr. 498.

[7] Morrison v. Wilson, 13 Cal., 494.

[8] Love v. Watkins, 40 Id., 547.

[9] Willis v. Wozencraft, 22 Id., 607.

[10] Miller v Fulton, 47 Cal., 146; Bruck v. Tucker, 42 Id., 346, 352; Kentfield v. Hayes, 57 Id., 411.

v. Quinn[11] and Cadiz v. Majors,[12] the equities of the defendant were not pleaded. The *dicta* in the decisions of cases where the answer consisted of mere denials, that the equitable defense should be pleaded with a prayer for affirmative relief, are not to be regarded as authoritative. In an action of 'ejectment' by a plaintiff having the legal title, the defendant may rely on a contract of purchase which gave him the right of entry, and which has been completely executed and performed on his part, together with his continued possession. But all the facts on which he relies should be averred in the answer. In view of the intimation in Bruck v. Tucker, it will always be safer to aver (as was done in this case) that the price paid was a just and fair price and the full value of the premises. Of course, under such circumstances, the defendant will usually pray for equitable relief. If, by lapse of time, or for any other reason, he may have lost his right to an equitable decree, he will still be entitled to rely on his perfect equity as a defense to an action brought to deprive him of the possession."

NUISANCE. [NOISE AND VIBRATION.] A ROLLER-COASTER OR GRAVITY RAILROAD ENJOINED AS A NUISANCE.—In *Schlueter v. Bellingheimer*,[13] it is held by the Common Pleas of Hamilton County, Ohio, in a learned and extended opinion by Buchwalter, J., that where the proprietor of a public resort, located in an otherwise quiet neighborhood, occupied for years by dwellings, introduces extreme features of amusement, as a roller-coaster or gravity railroad, causing unusual noise, and in a substantial degree depriving others, having ordinary sensibilities, of the ordinary comforts of life, such as rest and sleep at night, peace, quiet and rest on Sunday, disturbing family conversation, etc., he creates thereby a private nuisance; that, where the proof is clear, certain, and satisfactory that he has wrongfully done these things, working a serious injury, the court will restrain him from its continuance, without the intervention of a trial by jury; and that the mere fact that the complainants waited until after the roller-coaster was constructed and in operation would not estop them, since they did not know the character and degree of the noise, nor that it would be operated at unreasonable hours and times. The propriety of this ruling seems to be quite clear, and the learned judge found abundant authority to sustain it. In Davis v. Sawyer,[14] it was held that ringing factory bells at 5.30, 6 and 6.30 A. M., to awaken hands and their boarding house keepers, was a nuisance to dwellers near by, in disturbing their rest, and the ringing of the bells at those hours was enjoined. In the St. Mark's Chimes case,[15] the noise of a chime of church bells at various times of the day and night was declared a nuisance and enjoined. In Briggs v. Vattier,[16] the noise of a bowling-alley at night was declared a nuisance to the occupant next door and enjoined. In Bishop v. Banks,[17] the bleating of calves kept by a butcher over night for slaughter, was held to be a nuisance to those dwelling near by, and relief was granted. In Frey v. Auer,[18] the noise of a goldsmith's beating factory in a quiet neighborhood was declared a nuisance. In Walker v. Brewster[19] the court held that fire rockets, loud shouts of a crowd, and the music of bands in and about a music hall on grounds of public resort, was a nuisance to one dwelling on the next lot. In Inchbold v. Barrington[20] the noise of a circus entertainment to continue eight weeks, at a distance of about eighty-five yards from a tenant's house, was declared a nuisance to him and was restrained. In Leete v. Pilgrim Congregational Society, not reported,[21] a religious society was enjoined from striking the hours at night by clock machinary on a bell weighing about 3,000 pounds, in a church tower in a populous neighborhood; but the court refused to enjoin the society from maintaining a peal of bells striking the half and quarter hours in the day time, or from ringing a chime of bells to call worshippers to service at the regular hours. The subject of noise

[11] 41 Cal., 325.
[12] 33 Cal. 288.
[13] 14 Weekly Law Bulletin, 224.
[14] 133 Mass., 289.
[15] 3 Weekly Notes (Phila.), 384.
[16] 4 Weekly Notes (Phila.), 272.
[17] 33 Conn., 418.
[18] 10 Phil., 356.
[19] L. R. 5 Eq.
[20] L. R. 4 Ch. App., 388.
[21] 14 Mo. App., 590 (abstract)

and vibration as elements of nuisance was considered at length in an article in the *American Law Register* about two years ago.[22] The doctrine of private nuisance is one which escapes all rule and definition. In nearly every case the question is how much one man's comfort must yield to another man's profit, or to the general convenience, or to the public necessity; and it is quite clear that courts will more readily enjoin as private nuisances useless employments, such as games, plays and places of amusement, which work discomfort to near dwellers, than such employments as livery-stables, slaughter-houses, tanneries, and the like, which, though disagreeable, must exist somewhere and cause inconvenience to some one.

[22] 20 Am. Law Reg. (N. S.), 649.

MECHANICS' LIEN LAWS — WHO ENTITLED TO THEIR PROTECTION.

The so-called Mechanics' Lien Laws—perhaps more properly designated laws for the declaration and enforcement of liens for labor done and materials furnished for improvements upon land—are a frequent subject of construction in the courts, suggesting many questions of great interest to litigants and to the profession, among which none is of more importance than the inquiry, *in limine*, who are entitled to their protection. Although the lienor's right, in each instance, is held to depend upon the language of the local statutes under which he claims, and a compliance (whether strict or substantial, decisions differ,) with their provisions, yet all these laws, having the same object in view, are in their main features so nearly alike—in some instances precisely identical—that the decisions of one State may be used to advantage in any other, either as directly in point, where the statutes are like, or illustrating the principle involved where they are similar.

Mechanic's liens were unknown to the common law; they owe their existence to legislative enactment. To this day no such laws appear on the statute-books of Great Britain. The provisions of the Civil Law were more liberal, and in those countries adopting it, architects, contractors, workmen and artificers, who bestow their labor on buildings or other works, and who furnish materials, and also those who lend money to these parties, to be expended about their work or in furnishing materials, with the owner's knowledge or at his request, have a privilege or preference for their salaries, their wages, or the money or materials they furnish.[1] It was doubtless a familarity with the Civil Law, as well as a desire to foster the growth of towns and cities, and protect the laborers and material—men by whose aid they could be built up, that induced the framing and passage of these laws in the United States.[2] The first attempt to create a mechanic's lien arose from a desire to establish and improve as speedily as possible the City of Washington, as the permanent seat of government. In response to a memorial from commissioners appointed for this purpose, the legislature of Maryland, on Dec. 19, 1791, passed an act providing for liens on the houses erected and land occupied. The next statute on the subject was passed by the legislature of Pennsylvania in 1803.[3] These laws were subsequently amended materially, as it was ascertained from judicial construction wherein they fell short of affording the full protection intended. Some of the early laws were construed as affording no remedy to the principal contractor, but providing liens only for the mechanics and tradesmen, and this construction was supported by the argument that contractors were able to demand and obtain their own security, while the employes were often defrauded by insolvent owners and dishonest contractors.[4] These decisions induced both Congress and the legislature of Pennsylvania to amend their legislation; and the statutes in force in the States generally now give the lien clearly to the contractor, and under certain safeguards to the sub-contractor, protecting the owner from the double lien anticipated in one of the cases cited. The statutes generally declare entitled to the lien "any person to whom a debt is due for labor performed or furnished,

[1] Domat's Civ. Law, § 1741 *et seq.*, cited Phil. Mech. Liens, § 3.

[2] Phillips Mechanics' Liens, § 6.

[3] Ibid, § 7.

[4] Winder v. Caldwell, 14 How (U. S.), 434; Jones v. Shawan, 4 Watts and Serg. (Pa.), 257; Hoatz v. Patterson, 5 Watts & Serg. 538; Bolton v. Johns, 5 Penn. (Barr), 145.

or for materials furnished and actually used in the erection, alteration, or repair of a building or structure, upon real estate, by virtue of an agreement with or by consent of the owner or any person having authority from or rightfully acting for such owner in procuring or furnishing such labor;[5] "any person who shall perform any labor in erecting, altering or repairing any house, building, or appurtenance to any house, building, or building lot, including fences, * * * * or who shall furnish any material therefor;"[6] "every person who, as principal contractor, performs any work or labor, or furnishes any materials in or about the erection, construction, repairs," etc;[7] "every person performing labor upon, or furnishing materials to be used in the construction, alteration, or repair," etc.;[8] "every mechanic or other person who shall do any labor upon, or furnish any materials, machinery, or fixtures for, any building, erection," etc.[9] The provisions in the statutes of Minnesota,[10] Indiana,[11] Kansas,[12] and Nebraska,[13] are very similar; and an examination of the laws of all the States will disclose the fact that all spring from a common source and have a common object.

Exact as the phraseology here employed would seem to be, it has yet given rise to a vast amount of lamest discussion and widely differing judicial interpretation. In Massachusetts, under the section cited, it has been held that no mechanic's lien exists for labor performed by the owners of a planing-mill in sawing lumber in their mill, in the absence of an agreement between them and their employer as to the use to which the lumber shall be put, although it is in fact afterwards used in a building which he is erecting for another person under contract.[14] In another case it was held that a contract between A. and B., for B. to buy and A. to sell and convey to him land owned by A., does not subject the estate to a mechanic's lien in favor of C., who by B.'s employment performs labor in erecting a building which B. proceeds to put upon the land, although B. afterward's takes a conveyance of the land from A. in pursuance of the contract, and A. had notice of B.'s intention to build and knew of the progress of the building and never made objection.[15] In a subsequent case, however, where the conveyance, under a like contract, was made before the work was begun, the lien was sustained.[16]. And in cases where the contract was for A. to advance money to B., to be spent in erecting houses on A.'s land, and to convey the land to B., for a certain price,—B. to erect the houses and take the land within a certain time, liens in favor of the persons erecting the houses were upheld.[17] In the same State it has been held that no lien exists for labor performed or furnished in the removal of a building.[18] In New York, on the other hand, and entire contract for digging a cellar, erecting foundations, walls and piers, and moving buildings upon such foundations and piers, and for materials furnished therefor, has been held to constitute a basis for a lien[19].

The courts generally agree in construing these laws liberally, upon the theory that their object is beneficent, and that where the purpose of the law is to do substantial justice to all parties who may be affected, the statute should be fairly construed so as to advance the remedy.[20] Such statutes, it is said, are remedial in their character, and should not be so construed as to deprive creditors of the benefit intended to be conferred.[21] It has been held accordingly, in New York, that a Powder Company was entitled to a lien on the building for powder and fuse furnished to be used in blasting the foundation.[22] It seems that under the same law a person furnishing lightning-rods to a building would be

[5] Public Statutes of Mass., p. 1096.

[6] Revised Statutes of New York, p. 2411.

[7] Revised Statutes of Wisconsin, § 3314.

[8] Code of Civ. Proc. California, § 1183.

[9] Iowa, laws of 1876, chap. 100, § 3. Dakota Code Civ. Proc. § 655.

[10] Minnesota General Statutes, p. 871.

[11] Revised Statutes of Indiana, § 5293.

[12] Compiled laws of Kansas (4168).

[13] Compiled Stats. of Nebraska, p. 343.

[14] Bennett v. Shackford, 11 Allen, 444. *Contra*, Atkins v. Little, 17 Minn., 342.

[15] Hayes v. Fessenden, 106 Mass., 208.

[16] Corbett v. Greenlow, 117 Mass., 167.

[17] Hilton v. Merrill, 106 Mass., 528; Smith v. Norris 120 Mass., 58.

[18] Trask v. Searle, 121 Mass., 229.

[19] Chase v. James, 10 Hun, 506.

[20] Phillips Mechanics' Liens, § 16, 17. Skyrme v. The O. M. & M. Co., 8 Nev., 219; Hogan v. Cushing, 49 Wis., 169; David v. Alvord, 94 U. S., 545.

[21] Hubbell v. Schreyer, 15 Abb. Pr. (N. S.) 300.

[22] Hazard Powder Co. v. Byrnes, 12 Abb. Pr. 469.

entitled to a lien,[23] and one supplying hoisting apparatus necessary for and used in the erection of a building.[24] Authorities differ as to whether an architect is entitled to a lien for furnishing plans and superintending or directing the construction of a building. His lien has been sustained in Minnesota,[25] New York,[26] New Jersey,[27] Louisiana,[28] and Pennsylvania,[29] denied in Kentucky[30] and Missouri,[31] and doubted in Oregon.[32] Iowa has recently followed New York and granted a lien to the lightning-rod man,[33] but she has denied it to the plowman who "improved" a piece of land for the owner by breaking it.[34] The court admits this case, however, to be hastily considered. The California Supreme Court, in a very recent case, adopts a more liberal construction, and, expressing a belief that, without doing violence to the received meaning of language, a mine or pit, "sunk within a mining claim, may be called a structure," holds that one who performs labor in any pit, shaft or gallery of a mine is entitled to a lien on the whole mining claim.[35] Under a Nevada statute providing that "all persons performing labor for carrying on any mill shall have a lien on such mill for such work or labor done," it has been held that the labor of hauling quartz to the mill was indispensable to carry it on, and was therefore protected.[36] The Supreme Court of Colorado held differently, construing the law of that State.[37] The foreman or overseer of work on buildings and improvements, contributing his manual labor at the same time, has been allowed a lien.[38] The overseer of a mine has been held entitled in Nevada to a lien on the mine for his services as Superintendent.[39] But a claim of lien against the buildings, machinery and mining grounds of a corporation, by one who alleges himself to have been employed as agent, manager and superintendent, at a certain monthly salary, does not come within the spirit or letter of the mechanics' lien law of Montana.[40] It has been held otherwise in Utah, and their mechanic's lien law construed to include an overseer or foreman of a mine within their protection,[41] and this decision, on writ of error, was affirmed by the Supreme Court of United States.[42] Iowa has sustained the lien, where a part of the claim was for services as overseer.[43] Wisconsin has construed her log lien laws, to protect an amount due under contract for cooking food for the men engaged in driving the logs;[44] and the price due for board, even, when furnished at a hotel in a city several miles from the place where the men were at work, when the charges for such board are reasonable for men so engaged.[45] In Pennsylvania, if a mechanic engage his hands at a certain sum per day and their board, he may include in his lien the wages and boarding of the men, for it is a part of the compensation for his work and labor in the erection of the building.[46] But in California a claimant was denied a lien on a reservoir for the value of his services rendered in cooking for the men employed in constructing it.[47] Where a teamster who had hauled the lumber used in the erection of a building, filed his claim under the mechanics' lien law, it was held error in the court below to strike off the lien.[48] A mechanics' lien was sustained in Wisconsin, claimed under a general contract made by parties in Ohio, to furnish for a grist-mill in Wisconsin, certain machinery, including an engine and boiler, also the necessary plans, drawings and specifications, and bills of material, and the necessary time of a competent mechanic to superintend the erection of the engine and boiler, and the time of a competent mill-wright to superintend the erection of the other machinery.[49] In Nebraska, an agreement to manufacture at

[23] Quinby v. Sloan, 2 E. D. Smith, 594.
[24] Dixon v. La Farge, Ibid. 722.
[25] Knight v. Norris, 13 Minn., 473.
[26] Hubbell v. Schreyer, 15 Abb, Pr. (N. S.) 300; Stryker v. Cassidy, 76 N. Y., 50.
[27] Mut. Ben. L. Ins. Co. v. Rowand, 26 N. J. Eq. 389.
[28] Mulligan v. Mulligan, 18 La. Ann., 20.
[29] Bank of Penn. v. Gries, 35 Pa. St., 423.
[30] Foushee v. Grigsby, 12 Bush, 83.
[31] Raeder v. Bensburg, 6 Mo. App., 445.
[32] Willamette Falls Co. v Remick, 1 Oregon, 169.
[33] Harris v. Schultz, 21 N. W. Rep., 22.
[34] Brown v. Wyman, 56 Iowa, 452.
[35] Helm v. Chapman, 5 Pac. Rep., 352.
[36] *In re* Hope M. Co., 1 Saw., 710; Gould v. Wise, 3 Pac. Rep., 30.
[37] Barnard v. McKenzie, 4 Colo., 251.
[38] Willamette Falls Co. v. Remick, 1 Oregon, 169.
[39] Capron v. Strout, 11 Nev., 304.
[40] Smallhouse v. K. M. G. & S. M. Co., 2 Mont., 443.
[41] Cullins v. Flagstaff S. M. Co., 2 Utah, 209.
[42] Flagstaff S. M. Co. v. Cullins, Oct. Term, 1881.
[43] Foerder v. Wesner, 56 Iowa, 157.
[44] Winslow v. Urquhart, 39 Wis., 260.
[45] Kollock v. Parcher, 52 Wis., 393.
[46] Seybrandt v. Eberley, 36 Penn. St., 347.
[47] Mc Cormick v. Los Angeles Water Co., 40 Cal., 185.
[48] Hill v. Newman, 38 Penn. St., 157.
[49] Cooper v. Cleghorn, 50 Wis., 113.

plaintiff's factory at Leavenworth, Kansas, and deliver to defendants at Missouri Pacific Railroad depot, in Atchison, Kansas, certain machinery for defendant's elevator at Valparaiso, Saunders County, Nebraska, and the furnishing and delivery of such material so that defendants placed the same in their elevator building, was held to be protected by the mechanics' lien laws.[50] In Dakota, a transportation company, for transporting, under contract, a quantity of machinery from Chicago to Rockford, in Pennington County, Dakota, for use in a quartz mill, was held entitled to a lien on the mill.[51]

It has been a disputed question whether a lien would lie for materials furnished on contract for a building, but not actually used. The Massachusetts statute is plain — the material must have been actually used. But in the absense of such a limitation, Pennsylvania has sustained the lien in a number of cases:[52] it has been upheld in Missouri,[53] New Jersey,[54] Ohio,[55] Maryland,[56] Wisconsin,[57] and Iowa,[58] and denied in Connecticut,[59] Maine,[60] California,[61] and Illinois.[62]

Of course, the reasons for these differences depend, in some instances, upon difierences in the statutes, but quite as frequently on the theories entertained concerning the purpose and policy of lien laws. One class of decisions will be found construing them strictly, as in some sense a proceeding *in invitum*, and conferring special privileges on a particular class of creditors; another class, already referred to, regard them as laws that are eminently just and beneficient in their operation, simply extending the lien, which a laborer or mechanic might in most instances maintain by possession, to be operative against the building or structure his materials or labor have created. The New York Court of Appeals, in a case already cited,[63] fairly expresses the largely prevailing sentiment, and that which courts generally are adopting in construing and applying these statutes:—"This is a remedial statute, furnishing a summary remedy for the recovery of the claims provided for; and while it is to be strictly construed so far as to require a substantial compliance with every material provision by which the property of a third person may be incumbered, and a cloud put upon the title, by the mere act of the claimant, it is not to be so strictly construed as to deprive creditors of the benefit intended to be conferred. It is to be construed in the same spirit with which it was enacted, and so as to carry out the benign intent of the legislature."

EDWIN VAN CISE.

Deadwood. Dakota.

[50] Great Western Man'f'g Co. v. Hunter, 16 N. W. Rep., 759.

[51] N. W. Transp. Co. v. Stand-by G. M. Co., Justice Moody at *nisi prius*, Deadwood, 1882.

[52] Hinchman v. Graham, 2 S. & R., 170; Presb. Church v. Allison, 10 Pa. St., 413; Odd Fellows' Hall v. Masser, 24 Pa. St., 507; Singerly v. Doerr, 62 Pa. St., 9.

[53] Morrison v. Hancock, 40 Mo., 561.

[54] Morris Co. Bank v. Rockaway Man. Co., 14 N. J. Eq. 189.

[55] Beckel v. Pettigrew, 6 Ohio St., 247.

[56] Greenway v. Turner, 4 Md., 296.

[57] Esslinger v. Huebner, 22 Wis., 632; Cooper v. Cleghorn, 50 Wis., 113; Spruhen v. Stout, 52 Wis., 517.

[58] Wilson v. Iowa Eastern R. Co. 51 Iowa, 184.

[59] Chapin v. The P. & B. Paper Works, 30 Conn., 461.

[60] Taggard v. Buckmore, 42 Me., 77; Perkins v. Pike, Ibid. 141.

[61] Houghton v. Blake, 5 Cal., 240.

[62] Hunter v. Blanchard, 18 Ill., 318.

[63] Hubbell v. Schreyer, 15 Abb. Pr. (N. S.), 300, 304.

OFFICIAL BONDS.—LIABILITY OF SURETIES FOR MONEY STOLEN.

STATE v. NEVIN.*

Supreme Court of Nevada, July 26, 1885.

OFFICIAL BONDS. [*Negligence.*] *Sureties Liable for Moneys Stolen without Negligence.*—The sureties in the bond of a public treasurer who is required by law to keep the public moneys safely, which bond is conditioned for the faithful performance of the duties of the office, are liable for moneys stolen from such treasurer without his fault or negligence.

Appeal from a judgment of the district court of the first judicial district, Storey county, entered in favor of the plaintiff. The opinion states the facts.

W. E. F. Dean and *Wm. Woodburn*, for the appellant; *W. H. Davenport* attorney general, and *J. A. Stephens*, district attorney, for the respondent.

HAWLEY, J. This action was brought against the county treasurer of Storey county, and the sureties on official bonds, to recover an amount of money admitted to be deficient in the accounts of the county treasurer. The answer alleges that the money was forcibly taken by robbers from the treasurer and carried away by irresistible force "without any fault or negligence, or want of rea-

*S. C., 7 W. C. Repr. 160; Pac. Repr. 650.

sonable care or diligence in the preservation, and care of said sum of money, so that said sum of money was entirely lost to the treasury of said county, and no part thereof has ever been recovered." The district court sustained a demurrer which was interposed to this answer, upon the ground that the facts stated did not constitute any defense to the cause of action.

Was this ruling of the court correct?

The conditions named in the official bonds "is such that if the above bounden, Dennis Nevin, shall, well and truly, and faithfully, perform and execute the duties of treasurer of the county of Storey, now required by him by law, and shall, well, truly and faithfully, execute and perform all the duties of such office of treasurer, required by any law to be enacted subsequently to the execution of this bond, then this obligation to be void and of no effect, otherwise to be and remain in full force and effect."

Appellant insists that his responsibility under this contract is simply that which the common law imposes upon a bailee for hire; that he is not in any sense an insurer of the moneys in his custody, and should not be held responsible for the money that was stolen from him, and taken by the use of irresistible force without any negligence or fault or want of care on his part.

The great weight of the authorities upon this subject are adverse to the views contended for by appellant. The general rule upon this subject is to the effect that public officers who are entrusted with public funds and required to give bonds for the faithful discharge of their official duties are not mere bailies of the money to be exonerated by the exercise of ordinary care and diligence, that their liability is fixed by their bond and that the fact that money is stolen from them without any fault or negligence upon their part does not release them from liability on their official bonds.

Recognizing the almost universality of this rule, appellant contends that the decisions against him are founded upon the peculiar wording of the bonds, or provisions of the statute, to the effect that the officer shall *safely keep* and *pay over* all moneys coming into his hands. It is true, that in U. S. v. Prescott, 3 How., 588; Com. v. Comly, 3 Pa. St., 374; State v. Harper, 6 Oh. St., 610; Inhabitants of Hancock v. Hazzard, 12 Cush., 112, and other cases, considerable stress is placed upon this language in the bond. Thus in U. S. v. Prescott, the court said: "The condition of the bond has been broken, as the defendant, Prescott, failed to pay over the money received by him, when required to do so; and the question is, whether he shall be exonerated from the condition of his bond, on the ground that the money had been stolen from him? The objection to this defense is, that it is not within the condition of the bond, and this would seem to be conclusive. The contract was entered into on his part, and there is no allegation of failure on the part of the government; how. hen. can Prescott be discharged from his bond? He knew the extent of his obligation, when he entered into it, and he has realized the fruits of this obligation by the enjoyment of the office. Shall he be discharged from liability, contrary to his own express undertaking? There is no principle upon which such a defense can be sustained. The obligation to keep safely the public money is absolute, without any condition express or implied; and nothing but the payment of it, when required, can discharge the bond." But there are an equal or greater number of cases like Muzzy v. Shattuck, 1 Denio, 233; District Township v. Morton, 37 Iowa, 550; Inhabitants v. Mc Eachron, 33 N. J. L., 340; Boyden v. U. S., 13 Wall., 17, and State *ex rel.* Mississippi Co. v. Moore, 74 Mo. 413; s. c. 41 Am. Rep. 322, where the condition of the bond, like the one under consideration here, is for the faithful performance of the official duties, and the conclusions of the courts are substantially the same as announced in U. S. v. Prescott.

It is apparent that a bond requiring a faithful performance of official duty is as binding upon the principal and his sureties as if all the statutory duties of the officer were inserted in the bond.

In Indiana the statutory conditions in the bond are the same as required by the laws of this state. In Halbert v. State, *ex rel.* Com., 22 Ind., 130, the treasurer's bond was, however, conditioned not only for the faithful performance of his duties as the statute required, but also that he should "pay over all moneys according to law that might come into his hands as such treasurer." The court said: "It is objected that the latter branch of the condition was unauthorized by law, and, therefore, of no effect. But if the condition for the faithful performance of his duties includes the paying over according to law, of all moneys that might come into his hands as such treasurer, nothing is added to the legal effect of the bond by the latter branch of the condition. An examination of the various statutes bearing on the question, shows clearly enough that one of the duties of a county treasurer is to pay over according to law all moneys that come into his hands as such treasurer; hence, we shall consider the case as if the bond had been conditioned simply for the faithful performance of the duties of the office."

In Boyden v. U. S., 13 Wall., 24, the court referring to U. S. v. Prescott, said: "The condition of the receiver's bond in that case, it is true, was that the receiver should pay promptly when orders for payment should be received, while the bond in the case before us is conditioned that Boyden, the receiver, had truly executed and discharged, and should continue truly and faithfully to execute and discharge all the duties of said office according to law. But the acts of congress respecting receivers made it their duty to pay the public money received by them when ordered by the treasury department. * * * The bond, therefore, was an absolute obligation to pay the money, and differing not at all, in legal effect, from the bond in Prescott's case."

What are the duties of a county treasurer under the statutes of this State?

In addition to requiring an oath and an official bond it is, among other things, provided that the county treasurer "shall receive all moneys due and accruing to his county, and disburse the same, in the proper orders issued and attested by the county auditor:" 2 Comp. L., 2,981.

"He shall so arrange and keep his books that the amount received and paid out * * * shall be exhibited in separate accounts, as well as the whole receipts and expenditures by one general account:" 2 Comp. L., 2,984.

"He shall at all times, keep his books and office subject to the inspection and examination of the board of county commissioners, and shall exhibit the money in his office to such board, at least once a year, and as often as such board may require:" 2 Comp. L., 2,985.

"He shall annually make complete settlements with the board of county commissioners, * * * and shall at the expiration of his term of office, deliver to his successor all public moneys, books and papers in his possession:" 2 Comp. L., 2,991.

"He shall assist the county auditor and county commissioners in counting the money in his office, so that they may determine whether the funds, securities and property of the county are all on hand:" Stat. 1881, 21.

Under these provisions, is it not manifest that it is the duty of county treasurers to safely keep the public money and pay it out only as provided by law? The fact that the county treasurer is required "to receive money, and enter it in his cash book, implies, without any other special regulation, that he is to keep it, and being required to keep it, it follows that he is to keep it safely. This is one of the duties of his office he has undertaken faithfully to discharge:" Thompson v. Trustees, 30 Ill., 101.

Unless he safely keeps it, he could not exhibit it to the commissioners, as required by law, and it could not be counted. Neither could he deliver it to his successor in office. The duty to safely keep the money is made absolutely clear by the provisions of the statute already quoted and referred to. But there are also other provisions which are equally as strong and cogent. If any officer *charged* with the *safe keeping* of public money converts the same to his own use, or loans any portion of such money, he shall be guilty of embezzlement: Stat. 1881, 82; stat. 1883, 96.

Could a county treasurer, who converts the money to his own use, claim that he is not an officer who is charged with the safe keeping of the public money? It would be a stigma upon the law and a disgrace to the judiciary to say that he could successfully maintain such a defense. The statutes of this state, in relation to the duties of county treasurers, are almost identical with those of Indiana.

The supreme court of that state, in Halbert v. State, *supra*, after quoting the statutory provisions, said: "By these various provisions, it is clearly seen that it is the duty of a county treasurer to pay over the funds in his hands according to law, which may be upon orders drawn upon him by the auditor, or to his successor in office, and a failure to make such payment constitutes a breach in his bond, conditioned for the faithful performance of his duties," and declare that the fact that the money was stolen from the treasurer without his fault did not "relieve him from the necessity of discharging the obligation imposed upon him by his bond." This decision was followed in the subsequent cases of Morbeck v. State, 28 Ind., 86; Rock v. Springer, 39 Ind., 348; and Linville v. Leininger, 72 Ind., 494.

In Iowa, where the statute is not as strong as in this State, the same doctrine is held and applied to an officer upon a bond conditioned for the performance of his duties "to the best of his ability;" District Township v. Smith, 39 Iowa, 9.

The statutes of this State are more stringent than the statute of Ohio, except in relation to the conditions of the bond. In State v. Harper, 6 Ohio St. 610, the court said: "By accepting the office, the treasurer assumes upon himself the duty of receiving and safely keeping the public money, and of paying it out according to law. His bond is a contract that he will not fail, upon any account, to do those acts. It is, in effect, an insurance against the delinquencies of himself, and against the faults and wrongs of others in regard to the trusts placed in his hands. He voluntarily takes upon himself the risks incident to the office, and to the custody and disbursement of the money. Hence it is not a sufficient answer when sued for a balance found to have passed into his hands, to say that it was stolen from him; for even if the larceny of the money be shown to be without his fault, still, by the terms of the law and of his contract, he is bound to make good any deficiency which may occur in the funds which came under his charge."

We deem it unnecessary, upon this branch of the case, to specially refer to the numerous other authorities where the same doctrines are announced, as it is absolutely clear, from those already cited, that the distinction sought to be maintained by appellant that the conditions of the bond and the provisions of the statute of this State should be construed differently from the construction given in the decided cases, cannot be maintained.

In many of the cases, the courts have given an additional reason for their conclusions that a public officer cannot set up the defense of a robbery of the public funds in his possession. Thus, in U. S. v. Prescott, *supra*, Justice McLean, in delivering the opinion of the court, said: "The liability of the defendant Prescott, arises out of his official bond, and principles founded upon public policy." After discussing Prescott's liability upon the bond he adds: "Public policy requires that every depository of the public money should be held to a

strict accountability. Not only that he should exercise the highest degree of vigilance, but that he should keep safely the moneys which come to his hands. Any relaxation of this condition would open a door to frauds, which might be practiced with impunity. A depository would have nothing more to do than to lay his plans and arrange his proofs, so as to establish his loss, without laches on his part. Let such a principle be applied to our post-masters, collectors of the customs, receivers of public moneys, and others who receive more or less of the public funds, and what losses might not be anticipated by the public?"

In Com. v. Comly, *supra*, C. J. Gibson, in delivering the opinion of the court, said: "The opinion of the court in the case of the U. S. v. Prescott is founded on sound policy and sound law. * * * The keepers of the public moneys, or their sponsors, are to be held strictly to the contract, for if they were to be let off on shallow pretenses, delinquencies, which are fearfully frequent already, would be incessant." To the same effect are the decisions in District Township v. Morton, 37 Iowa, 553; U. S. v. Watts, 1 New Mex 562; Commissioners of Jefferson County v. Lineberger, 3 Mon. 241.

The only defenses recognized by any of the authorities in the United States at the present time, with the exception of Cumberland County v. Pennell, 69 Me, 357, for the failure of a public officer charged with the safe-keeping of the public funds to pay over the same, is where he is prevented from doing so by the act of God or the public enemy, without any neglect or fault on his part. We say the Maine case stands alone in its opposition to what it is pleased to term the new-born policy of the law. In that case, some reliance seems to have been placed upon the case of Albany v. Dorr, 25 Wend. 438; but the principles of that case were repudiated in Muzzy v. Shattuck, *supra*, and hence we are authorized to say that the case in Maine is unsustained by any other recognized authority in any of the courts of the United States, Federal or State.

In U. S. v. Thomas, 15 Wall. 341, it was held that the act of a public enemy, in forcibly seizing or destroying property in the hands of a public officer, against his will, and without his fault, is a discharge of his obligation to keep such property safely, and of his official bond, given to secure the faithful performance of that duty, and to have the property forthcoming when required.

Bradley, J., in delivering the opinion of the court, questions the correctness of some of the extreme views stated in some of the authorities referred to, and claims that broader language was used than was necessary where the defense set up was that the money was stolen, and says that "a much more limited responsibility" than was indicated in the language in Prescott's case "would have sufficed to render that defense nugatory." But there is no declaration of any legal principle contained in this opinion that would justify a court in permitting such a defense as was sought to be interposed in this case. It is said that public officers are bailees, "but they are special bailees, subject to special obligations. It is evident that the ordinary laws of bailment cannot be invoked to determine the degree of their responsibility."

In U. S. v. Humason, 6 Saw. 201, the court permitted the defense that the officer with the money was on a steamship which was lost at sea, and the officer drowned and the money lost in the Pacific ocean. The doctrines announced in that case are similar to the case of U. S. v. Thomas, and do not, in any manner, militate against the general views we have expressed.

In State *ex rel.* Mississippi Co. v. Moore, the defendant, who was county treasurer, answered that he ought not to be held upon his bond, because Mississippi county "being overrun with tramps, thieves, robbers, public enemies, the money could not be safely kept in said county," and that for the purpose of keeping it safely, he deposited to his credit, as treasurer, in a bank in St. Louis, which failed, whereby the money was wholly lost. The court said: "Such an answer as this, we think, is insufficient to shield defendant from liability in any view which can be taken of the case. If the obligation assumed by defendant in his bond to deliver over to his successor in office all money belonging to the county, can only be met or discharged by making such delivery or payment, it is clear that the facts set up in the answer, and admitted to be true, constitute no defense. That the above rule is a correct one, governing in such cases, is established by the following authorities:" Citing State v. Powell, 67 Mo., 395, and the various decisions of the supreme court of the United States. "If on the other hand under the rule laid down in the case of U. S. v. Thomas, 15 Wall., 337, defendant is to be regarded as a bailee and exempt from liability to pay when the loss is occasioned by the act of God or a public enemy, he would still be liable, under the facts stated in the answer, because they show that the loss was not occasioned in either of these ways. The tramps, thieves and robbers which it is alleged overrun Mississippi county, while they are enemies to the peace and safety of the public and social order, they are not public enemies in the legal sense of these words. By enemies, it is to be understood public enemies with whom the nation is itself at open war; and not merely robbers, thieves and other private depredators, however much they may be deemed, in a moral sense at war with society. Losses, therefore, which are occasioned by robbery on the highway or by depredations of mobs, rioters, insurgents and other felons, are not deemed losses by enemies within the meaning of the exception." 12 Fed. Rep. 790.

The action of the district court in sustaining the demurrer to the answer was correct.

The other positions taken by appellant relative

to the time when the cause of action could be commenced, are wholly untenable. Having admitted the defalcation and claimed the right to interpose the defense inserted in his answer, the State was not compelled to wait until the close of the appellant's term of office before commencing an action upon his bond.

The judgment of the district court is affirmed.

NOTE.—The effect and operation of an official bond is not merely to add to the personal liability of the officer, the responsibility of the sureties who join him in its execution. It has the further effect to add the sanction of a direct personal contract, and to define the obligations incurred by the terms of the bond and the statutes by which it is authorized. If a public officer gives no bond, and the statute creating the office requires none, and imposes no special responsibilities upon him, his liability for public funds in his hands is that of a bailee for hire. His whole duty is to bestow upon the interest committed to his charge the care and attention which prudent men give to their own affairs. If he does this, and nevertheless a loss occurs by robbery or otherwise, he is without blame, and can suffer no loss. There are, however, very few such officers. It is a rule, almost without exception, that every officer entrusted with public money, is required by the law creating the office which he holds, to furnish a bond with security conditioned for the faithful discharge of all the duties of that office. Upon the well settled principle that every obligation is most strongly construed against its obligor, such a bond must logically include the literal performance of every duty within its purview. If by the terms of the bond, or of the statute, money is to be kept, it must be kept. If money is to be paid, it must be paid. To every excuse for any breach of duty, loss by fire, by theft, by robbery, the answer is ready: "The duty should have been performed, for it is so nominated in the bond." If impossibility be pleaded, the answer is that, "although the law does not compel to impossibility, by your bond, you have guaranteed that this thing shall not become impossible, and upon that guaranty you are liable." This is the law as established by a long line of authorities, in one of the oldest of which is to be found the key-note of the whole matter. In that case[1] it was "resolved" that "when a party by his own contract creates a duty or charge upon himself, he is bound to make it good if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract." This was a case of injury by a public enemy, to-wit, "a certain German prince, by name Prince Rupert." So where a tenant for life covenanted to repair the house and leave it in repair, it was held to be no answer, that part of the house was destroyed by fire, and that the tenant had repaired the remainder, for it was the duty of the tenant in compliance with his covenant, to rebuild so that he could leave it in repair.[2] And if a tenant covenant to pay rent, and during the term the house is burned down, he is bound to pay, although the lessor did not rebuild for a whole year.[3] Manifestly, in individual contracts, the law holds the party to mean what he says, and if he says it in writing, the terms of his written contract, upon most elementary principles, control his liability.

[1] Paradine v. Jane, Aleyn 26.

[2] Walton v. Waterhouse, 2 Saund. (2nd part.) 422 note a; see also Monk v. Cooper, 2 Ld. Raymd. 1477; s. c., 2 Strange 763; Baker v. Holtzaffell, 4 Taunt. 415.

[3] Monk v. Cooper, *supra*.

The stringent rule supported by the foregoing cases has not been, until recently, materially modified in the American courts. In the leading case[4] cited in the opinion under consideration, the court holds that it was no case of bailment at all, that the liability of the defendant arose out of his official bond, and principles which are founded on public policy, and that the theft or robbery of public money from the defendant was no defense to an action on that bond. This ruling has been followed in many cases cited in the opinion, and in others.[5]

And the liability of the officer, or more properly, of his sureties, was enforced in a case in which, if in any, an opposite conclusion could be expected. Collins, a receiver of public money, was murdered and robbed, having fought gallantly in defense of his trust against an irresistible force. The court held his sureties liable on the ground that their principal was, in effect, a debtor to the government, an insurer, and that, although the robbery did not take place until the officer was dead, the liability of the sureties was not discharged and could not be, until the money had been duly paid over to government.[6]

It may be regarded as settled law, that the obligor in a private covenant, or an official bond, is not released from his obligation by anything short of the act of God or of the public enemy. Under deep submission it may be said, the authorities which tend to establish those exceptions, are not in accord with the symmetry of the law and the tenor of antecedent decisions. In the case of United States v. Thomas,[7] the court makes a distinction between a direct covenant, or absolute agreement to do a thing, and a condition to do the same thing inserted in a bond. In the latter case, the court holds that the party may be excused if prevented by the law or an overruling necessity. In support of this view the *dictum* of Lord Coke is cited,[8]—"where the condition of a bond recognizance, etc., is possible at the time of making of the condition, and before the same can be performed, the condition becomes impossible by the act of God, or of the law, or of the obligee, etc., there the obligation, etc., is saved." Upon this *dictum* the court founds the decision that the condition of the bond of a receiver of public money is not broken by the seizure of that money by the public enemy, *i. e.*, the rebel military forces. It will be observed, that in applying Lord Coke's *dictum* to the case in judgment, the court expands the "etc.," in Coke's text into "the public enemy," and might with equal reason, make that little abbreviation include theft, robbery, fire, and every other means by which a custodian of money could lose that money. The act of rebel authorities in seizing United States money, is neither the act of God, nor of the law, nor manifestly of the obligee of the custodian's bond, and can only be included in the indefinite "etc.," which may mean anything or nothing. The weight of authority is clearly in favor of the dissenting minority of the court who following the opinion of the court in the case of the United States v. Prescott,[9] state the true rule thus: "That the depositary and his sureties having given a bond the condition of which is an express contract to pay or deliver, they were bound by that contract, according to the rigid terms which the law annexes to

[4] United States v. Prescott, 3 How. (U. S.) 578, 587.

[5] United States v. Morgan, 11 How. 160; United States v. Dashiell, 4 Wall 182.

[6] United States v. Watts, 1 New Mex. 553.

[7] 15 Wall. 341.

[8] Co. Litt. 206 (a) Shep. Touchst. 372; 2 Bliks. Comm. 340, 341; Bacon Abridg. Tit. Condition (N) (p. 306); Comyn's Dig. Tit. Condition (D) 1.

[9] 3 How. (44 U. S.) 578.

such covenants or promises."[10] The ruling of the majority of the court has been followed in several cases in the Federal courts.[11] Manifestly the doctrine has grown out of the exceptional conditions under which the cases arose, the prevalence of civil war, and the excessive hardships of holding officers liable for losses caused by the overwhelming force of the public enemy. The question who is, or more properly, who is not a public enemy, is answered in a Missouri case.[12] Tramps, thieves, and robbers are not public enemies in the sense contemplated by the Supreme Court of the United States in the case of the United States v. Thomas, "By enemies, is to be understood public enemies, with whom the nation itself is at open war."[13]

Hence, it is no defense to a suit on the bond of a receiver of public money, that the money was stolen from him without his fault;[14] or that it was taken from him by force.[15] And it is no excuse that for fear of tramps, thieves and robbers, the custodian deposited the money, contrary to law, in a bank which became insolvent;[16] nor is the officer exonerated by having deposited the money in a bank which had been selected by the government for the use of its officers and agents, it not being any part of his duty to deposit in it.[17] Nor can an officer relieve himself of liability to the government, which he serves by a voluntary payment to a creditor of that government.[18]

The sum of the whole matter seems to be this: If the officer has given no bond, and no special safeguards are provided by statute, he is liable as a bailee for hire. This liability is not abrogated by his giving a bond which in such case is a cumulative security.[19] The liability created by the bond, is of course dependent upon the terms prescribed by the statute and expressed in the bond. If, as in an Iowa case,[20] the bond requires only "reasonable diligence and care," the courts can demand nothing more of him. If the terms of his bond by fair construction, make him an insurer of the public money in his hands, he is an insurer, and no exception is available unless it is made in the statute or in the bond, or can be fairly implied from one or the other.

WM. L. MURFREE, Sr.

St. Louis, Mo.

[10] United States v. Thomas, 15 Wall. 358; dissenting opinion citing United States v. Morgan, 11 How. 154; United States v. Dashiel, 4 Wall. 182; United States v. Keehler, 9 Wall. 83; see also on the subject generally, Wren v. Kirton, 21 Ves. 381; Rowth v. Howell, 3 Ves. 556; Utica etc. R, Co. v. Lynch, 11 Paige 520; Knight v. Lord Plymouth, 3 Atk. 480; Lane v. Cotton, 1 Ld. Raymd. 640; Whitfield v. Le Despencer, Cow. 754; Wheeler v. Hambright, 9 Serg. & R. 396; Muzzy v. Shattuck, 1 Denio 233; Supervisors v. Dorr, 25 Wend. 440; (overruled by preceding case); State v. Harper, 6 Ohio St. 607; Bevans v. United States 13 Wall. 56; Farrar v. United States, 5 Pet. 373.

[11] United States v. Huger, 1 Hughes C. C. 397; United States v. Humason, 6 Saw. C. C. 199.

[12] State *ex rel.* Mississippi County v. Moore, 74 Mo. 413; S. C., 41 Am. Rep. 322.

[13] State *ex rel.* Moore, *supra.*

[14] United States v. Prescott, 3 How. 578; United States v. Dashiel, 4 Wall. 182.

[15] Bevans v. United States, 13 Wall. 56; Halliburton v. United States, 13 Wall. 63.

[16] State *ex rel.* v. Moore, *supra.*

[17] United States v. Freeman, 1 Woodb. & M. C. C. 45.

[18] United States v. Keehler, 9 Wall. 83.

[19] Walter v. United States, 9 Wheat. 655.

[20] Ross v. Hatch, 5 Iowa, 149.

INTERSTATE EXTRADITION.

STATE *EX REL.* STUNDAHL v. RICHARDSON.

Supreme Court of Minnesota, August 14, 1885.

EXTRADITION, INTERSTATE. [*Habeas Corpus.*]—*Prisoner Discharged for Defect in Recitals in Governor's Warrant of Surrender.*—To a *habeas corpus* it was returned that the respondent held the prisoner under a warrant of the Governor of the State authorizing his delivery to the Territory of Dakota. The warrant recited that the alleged fugitive stood charged "by complaint in the County of Minnehaha, in the Territory of Dakota, with the crime specified," but did not show that he was so charged by indictment found or affidavit made, accompanying the requisition. Nor were these facts shown by any papers exhibited with the return. It was held that, because of the failure to show these jurisdictional facts, authorizing the governor to issue his warrant of surrender, the prisoner was entitled to be discharged. It would not be intended that the word "complaint" in the warrant meant a complaint on oath.

Appeal from an order of the district court, Fillmore county, discharging Stundahl from custody of appellant.

A. G. Chapman, for the State; *N. Kingsley*, County Atty., and *W. J. Hahn*, Atty. Gen. for appellant.

VANDERBURGH, J., delivered the opinion of the court:

In order to give the executive of the State jurisdiction to issue his warrant for the surrender of an alleged fugitive from justice, upon the requisition of the Governor of another State, three things are essential under the act of Congress: (1) He must be demanded by the executive of the State from which he fled; (2) a copy of an indictment found, or an affidavit made before a magistrate, charging him with having committed the crime specified; (3) such copy of the indictment or affidavit must accompany the requisition, and be certified as authentic by the executive of such State. If these requisites are complied with, a warrant of surrender may properly be issued, and the party charged is properly restrained of his liberty. *In re* Clark, 9 Wend. 220. It is not necessary that copies of the indictment, affidavit, or other records, be annexed to the warrant. It is sufficient that they be produced if the warrant be called in question, or that the jurisdictional facts are recited on the face of the warrant. *In re* Donohue, 84 N. Y. 442; *In re* Romaine, 23 Cal. 592.

The appellant, as marshal of the village of Lanesboro, made return to the writ of *habeas corpus* in this matter that he detained the relator, an alleged fugitive, by virtue of the executive warrant annexed to his return; and, no other records being produced, the case was determined by the district judge solely upon the sufficiency of such warrant. The chief objection urged against the warrant is that it is insufficient in that it recites that the alleged fugitive stands charged "by complaint in the County of Minnehaha, in the Territory of Dakota, with the crime specified," but

does not show that he was so charged by indictment found or by affidavit made, accompanying the requisition.

It is contended by the appellant that the term "complaint" will, in such case, be intended to mean a complaint upon oath, and that the executive, in the discharge of his duty, must be presumed to have found it to be sufficient in form and substance to justify his official action in assuming to issue the warrant of surrender, and we are referred to the practice in Massachusetts, where it is held, under a State statute resembling our own, that a warrant, which recites generally that the governor is satisfied that the demand is conformable to law and ought to be complied with, is sufficient. Gen. St. 1878, c. 103, § 2; Kingsbury's Case, 106 Mass. 223. It is a sufficient answer to this, however, that in the case at bar the warrant does not contain any such general recital, and it is therefore, unnecessary for us to decide whether a warrant in that form would, by itself, be sufficient. Here the warrant assumes to set out and recite the jurisdictional facts relied on, and the relator claims it to be insufficient in the particular mentioned, and hence, in the absence of the record upon which the governor acted, no justification for the officer. We think the objection well taken. It ought to have appeared in this case by the return to the writ of *habeas corpus* that the executive was furnished with the required copy of the indictment or affidavit duly certified as authentic. As to the jurisdictional matters above referred to, the rule is held strictly.

An indictment or an information embodies a criminal charge or accusation by a grand jury, or by an officer acting under the sanction of an oath pursuant to law; but if the charge is not made in that form, then it must affirmatively appear to have been made by affidavit. Such affidavit must, of course, be in writing, and duly certified by the magistrate before whom made. It may be conceded that a complaint is the initial proceeding in criminal prosecutions and examinations before magistrates, and that such complaint is required to be upon oath. Campbell v. Thompson, 16 Me. 117. It may, also, by itself, if the statement of the criminal charge be sufficient, constitute an examination so as to authorize the issuance of a warrant. State v. Nerbovig, 24 N. W. Rep. 321. And if a jurat be attached, and it be properly certified by the magistrate, as is frequently the case in practice, it will be essentially an affidavit. But a complaint is not necessarily an affidavit, nor are they in legal practice or contemplation understood as convertible terms. For, though a complaint may be reduced to writing and subscribed it need not necessarily be certified by the magistrate, for the fact may otherwise appear by his records. And so a complaint may be merely formal, and made or entered by one who has but little, if any, knowledge about the facts, and the examination consist of the deposition of other witnesses, State v. Armstrong, 4 Minn. 343, 344 (Gil. 251) while an affidavit, as the term is ordinarily used in such cases, is understood to be a sworn statement of facts or a deposition in writing, and to include a jurat which means a certificate of the magistrate, showing that it was sworn to before him, including the date and sometimes, also, the place. Young v. Young, 18 Minn. 94 (Gil. 72). In this class of cases it will be implied from the executive authentication that the certifying officer is such magistrate. Order affirmed.

NOTE.—The subject of inter-state extradition was considered in a learned and elaborate article by W. W. Thornton, Esq., in the June, 1883, number of the *Criminal Law Magazine*. The scope of this note will admit of no more than a general discussion of the subject, and I shall merely indicate some of the questions which arise in connection with the writ of *habeas corpus* in these cases.

The constitution of the United States provides that "a person, charged in any State with treason, felony or other crime who shall flee from justice, and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime." In the year 1793, on the recommendation of President Washington, the Congress passed an act to give efficacy to this provision.[2] In order to give the governor of the State in which a person is arrested, as a fugitive from the justice of another State, jurisdiction to surrender him for extradition under this statute, it is said that three things are requisite: 1. The fugitive must be demanded by the executive of the State from which he fled; 2. A copy of the indictment found, or the affidavit made before the magistrate, charging the fugitive with having committed the crime, must accompany such requisition; 3. Such copy of indictment or affidavit must be certified as authentic by the executive making the demand.[3]

Jurisdiction exists in the State courts, and has been exercised from the passage of the statute to the present time, without question except in one case which will be hereafter considered, to inquire, by means of the writ of *habeas corpus*, into the validity of the grounds upon which the person arrested as a fugitive from the justice of another State is held for extradition.[4] The questions which arise in the exercise of this jurisdiction present themselves at two stages of the proceeding against the alleged fugitive: 1. Where he is arrested and held for extradition upon a charge of having committed a crime in another State, before a requisition has been made by the governor of such State for his surrender; 2. Where such a requisition has been made, and the governor of the State upon whom it has been made has issued his warrant of surrender, and the prisoner is held thereunder.

In the first of these cases the sound view is that the act of Congress is not exclusive; but that it was passed merely to give efficacy to the power of surrender which already existed. This doctrine proceeds on the

[1] Const. U. S. Art. 4, § 2.

[2] Act of Feb. 12. 1793, Ch. 12 § 1; 1 U. S. Stats. at Large, p. 302; U. S. Rev. Stat. § 1578.

[3] *Re* Clark, 9 Wend. 212, 219; State v. Schlemm, 4 Harr. (Del.) 577; Kingsbury's Case, 106 Mass. 223; People v. Donahue, 84 N. Y. 438, 441; People v. Pinkerton, 17 Hun, 199; *Ex parte* Lorraine, 16 Nev. 63. So under California Statute, *Re* Romaine, 23 Cal. 585.

[4] *Re* Manchester, 5 Cal. 237; and other cases cited in this note.

obvious ground that no State is bound to afford an asylum for the escaped criminals of another State, but may arrest them and expel them from its borders, or surrender them upon a demand of such other State, as a mere matter of interstate comity.[5] The proper authorities of a State within whose boundaries a fugitive from the justice of another State has taken refuge, have therefore the undoubted power to arrest such person and hold him a reasonable length of time to await a demand of the State from whose justice he has fled, for his extradition;[6] and what is a reasonable time, in the absence of an express provision of statute, will be a question to be decided by a court or judge on *habeas corpus*, having reference to the circumstances of each particular case.[7] In such a case the court or judge examining into the ground of the detention on the *habeas corpus* must be careful to see that the charge upon which the prisoner is held amounts to a crime under the law of the State from whose justice he is claimed to have fled;[8] and, on plain grounds, the burden rests upon the person claiming the right to hold the prisoner, to produce proof of the law of such other State, for the purpose of showing that the act charged is a crime by such law, unless it appears to be a crime by the common law, in which case such proof would probably be dispensed with. In determining this question the court or judge is to bear in mind that the settled meaning of the word "crime," as used in the constitutional provision, is that which embraces every offence forbidden and made penal by the law of the State, whether common or statutory, and includes what are called misdemeanors as well as treason and felony.[9]

In the second class of cases above mentioned, namely, where the governor of the demanded State has, upon an inspection of the requisition of the governor of the demanding State, and of the indictment or affidavit accompanying the same, in the exercise of the power conferred upon him by the act of Congress, seen fit to issue his warrant of surrender, the principal question is, how far the judicial courts or the judges thereof have authority, by *habeas corpus*, to review or superintend his action in the premises, to re-examine the evidence upon which he has acted, and, if it is not by them deemed sufficient to bring the case within the Constitution and the Act of Congress, to discharge the prisoner from custody under such warrant. If the question were to be decided upon principle, there could be but one answer, and that would be that the judicial courts and judges possess no such power. The Act of Congress having conferred the authority to decide and to act upon the governor of the State within whose borders the alleged fugitive is apprehended, and having conferred no power upon any other authority to review or superintend his action, it must, upon every sound principle of jurisprudence, be deemed a finality, and the attempts of courts and judges to exercise such a power ought to be regarded as acts of mere extra-judicial officiousness and intermeddling. The State courts have, however, constantly exercised this power, holding as the principal case holds, that the grounds upon which the governor of the demanded State is authorized by the Act of Congresss to surrender the alleged fugitive must be exhibited in the return to a *habeas corpus* by the person having the alleged fugitive in custody.[10]

The Federal courts have exercised the same power, proceeding upon the ground that process of interstate extradition is Federal process because it is authorized by act of Congress.[11] The difficulty of admitting such a jurisdiction in the Federal courts is even greater than in the case of the State courts. It must be accepted as a general principle of jurisprudence that the public authorities of one sovereignty must give full faith and credit to the official acts of the public authorities of every other sovereignty: that they will not assume to judge of the power or jurisdiction of the public authorities of another sovereignty, but will conclusively presume that such authorities are competent to determine the extent of their own power and jurisdiction, and that they have determined it correctly in any given case. The only just limitation upon this principle seems to be that the public authorities of one sovereignty will disregard the acts of the public authorities of another sovereignty, where it is necessary to do so in order to assert their own jurisdiction over the given subject matter, to enforce their own process, or to protect their own agencies of government. Unless, then, the governor of the State surrendering the fugitive to the justice of another State, is *pro hac vice*, a mere Federal officer, because the manner of making the demand and surrender is directed by an Act of Congress, no principle is discovered upon which the Federal courts can erect a superintending jurisdiction over the governors of the States in these cases, unless where it may be necessary to interfere in order to get possession of a prisoner who is answerable, upon a charge of crime or otherwise, in a Federal tribunal.

It was upon the ground previously stated, that the Circuit Court of the United States for the District of California, in a recent case, assumed to overrule the Supreme Court of California, and to hold that that court had no jurisdiction by *habeas corpus* in a matter of inter-state extradition.[12] But the Supreme Court of the United States, getting possession of the case by means of a writ of error to the Supreme Court of California, overruled the decision of the Federal circuit court, and affirmed the jurisdiction of the State court, but left the question of the concurrent jurisdiction of the Federal courts in such cases undecided, as that question did not arise in the case before it.[13] This decision, pushed to its logical conclusion, must result in denying the ju-

[5] Commonwealth v. Deacon, 10 Serg. & R. 125; State v. Buzine, 4 Harr. (Del.) 572; Matter of Fetter, 23 N. J. L. 311; Lundy's Case, 2 Ventres, 314; Rex v. Kimberley, 2 Str. 848; s. c., Fitzg. 111; 1 Bernard. K. B. 225; East India Co. v. Campbell, 1 Ves. 245. It has been supposed that, since the Constitution and the Act of Congress, the States possessed no such power, since the exercise of such a power would be a violation of that provision of the Federal Constitution, (Art. I, § 10, clause 2.) which prevents the States from entering into agreements or compacts with each other. But this seems to be a very strained conclusion.

[6] State v. Buzine, 4 Harr. (Del.) 572, 575; Commonwealth v. Deacon, 10 Serg. & R. 125, 135; s. c. 2 Wheel. Cr. C. 1, 17; *Re* Washburn, 4 John. Ch. 106; Matter of Fetter, 23 N. J. L. 311, 317; People v. Schenck, 2 John. 479; Matter of Goodhue, 1 Wheel. Cr. C. 427; s. c. 1 City Hall Rec. 153; s. c. *sub. nom.* People v. Goohue, 2 John. Ch. 198. *Contra.* People v. Wright, 2 Caines, 213 (overruled).

[7] State v. Buzine, 4 Harr. (Del.), 572, 576.

[8] State v. Buzine, 4 Harr. (Del.), 572, 576. Compare Tullis v. Fleming, 69 Ind. 15.

[9] Kentucky v. Dennison, 24 How. U. S. 66, 99; *Re* Clark, 9 Wend. 212, 222; Morton v. Skinner, 48 Ind. 123; People v. Brady, 56 N. Y. 182, 188; People v. Donohue, 84 N. Y., 438, 441.

[10] *Re* Clark, 9 Wend. 212, 219; People v. Brady, 56 N. Y., 182, 186. Compare *Re* Manchester, 5 Cal. 237.

[11] *Ex parte* Smith, 3 McLean, 121.

[12] *In re* Robb, 1 W. C. Repr. 439.

[13] Robb v. Connelly, 4 Sup. Ct. Repr, 544; s. c. 111 U. S. 624. So previously held by the Supreme Court of Alabama in Mohr's case, 18 Cent. L. J. 252 (Brickell, C. J., dissenting.

risdiction of the Federal courts in these cases whenever the question is distinctly presented to the same tribunal for determination. For, if the process of inter-state extradition is Federal process, and if the governor of the demanded State, in issuing his warrant of surrender, is a mere Federal agent (which the Supreme Court of the United States hold he is not), no jurisdiction can exist in the State courts to superintend his action by *habeas corpus*. On the other hand, if he is acting as the political representative of a sovereign State in the discharge of a duty imposed upon such State by the compact known as the Constitution of the United States, no principle exists upon which the courts of another sovereignty, to-wit: those of the United States, can superintend his action. Moreover, the assertion of such a power of superintendence is destructive of the dignity, the rights and independence of the States, and must be regarded, upon every sound principle of constitutional interpretation, as merely a part to that process of disintegration and leveling which is going on the Federal tribunals; irresponsible of the people, by which the States of the Union must in time lose their sovereign character and sink to the mere grade of municipal corporations.

The care incumbent upon a court or judge proceeding by *habeas corpus*, in a case where a person is arrested charged with having committed a crime in another State, and held to await a requisition from the governor of such other State, to see that the act charged against him is a crime by the law of such other State, within the meaning of the Federal Constitution, is not necessary where the case arises after the governor of the demanded State has issued his warrant of surrender; for in such a case the governor of the demanding State has certified in his requisition that the act charged is a crime by the law of such State, and the better opinion is that such certificate is conclusive evidence of the fact.[14] But confusion exists among the decisions upon this question. It is held that the papers charging the crime upon which the extradition is demanded, if returned to the *habeas corpus*, will be scrutinized, with the view of determining whether in fact they charge a crime which authorizes extradition.[15] The affidavit must allege that the crime was committed within the limits of the State demanding the extradition.[16] While the governor of the demanded State is conceded to be the only proper judge of the authenticity of the affidavit or indictment on which the demand is made,[17] yet if the affidavit does not in substance exhibit a case within the Constitution and Act of Congress, the prisoner will be discharged on *habeas corpus*.[18] Other courts have settled upon the conclusion that if the evidence upon which the governor issued his warrant of surrender accompanies the same, the court or judge on *habeas corpus* will scrutinize it to see that the warrant has been issued in a case allowed by the Constitution and Act of Congress, and if it has not been will, discharge the prisoner.[19] But if such evidence does not accompany the warrant, it will be presumed in support of the action of the governor, that his warrant has been issued in a case allowed by the Constitution and the statute; in other words, his warrant will be *prima facie* evidence that there was a proper affidavit or indictment.[20]

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[14] State v. Buzine, 4 Harr. (Del.) 572, 576; *Re* Clark, 9 Wend. 212; Johnston v. Riley, 13 Ga. 97; Robinson v. Flanders, 29 Ind. 10. So held, where in addition to the governor's certificate there was an indictment charging an offence of a highly immoral character. Matter of Fetter, 23 N. J. L., 311, 320.

[15] People v. Brady, 56 N. Y. 182; *Ex parte* Pfitzer, 28 Ind. 450.

[16] Matter of Hayward, 1 Sandf. (S. C.) 701; Matter of Fetter, 23 N. J. L. 311, 320. But in such a case if the defect in the affidavit is helped out by other affidavits, or by other evidence adduced upon the hearing of the *habeas corpus*, the prisoner will be remanded. Matter of Fetter, *supra*.

[17] *Re* Manchester, 5 Cal. 237. See also *Re* Clark, 9 Wend. 212.

[18] Hartman v. Aveline, 63 Ind. 344; *Re* Manchester, 5 Cal. 237.

[19] *Ex parte* Pfitzer, 28 Ind. 450.

[20] Nichols v. Cornelius, 7 Ind. 611; Robinson v. Flanders, 29 Ind. 10; People v. Donohue, 84 N. Y. 438.

MANDAMUS—INJUNCTION AGAINST JUDGMENTS.

STATE EX REL PHELAN v. ENGLEMANN.

Supreme Court of Missouri, June 26, 1885.

1. MANDAMUS. *Does not Lie to Compel Issue of Execution on Judgment which has been Enjoined.*—Where a judgment rendered at law, has been enjoined in an equitable proceeding on the ground of fraud or mistake, *mandamus* to compel the clerk of the former court to issue an execution upon such judgment, is not the proper remedy. An appeal from the decree in the equitable proceeding furnishes an adequate remedy, and *mandamus* does not lie where there is such other remedy; and this, although such appeal may involve inconvenient delay, or operate oppressively, or the injunction was erroneously granted, if the court granting it had jurisdiction in the premises.

2. EQUITY—*Jurisdiction to Enjoin Judgments at Law.*—Where a judgment is obtained or entered at law through fraud, accident or mistake, equity has jurisdiction to enjoin its enforcement. It is immaterial that the judgment so enjoined has been pronounced or affirmed by the Supreme Court. The jurisdiction extends to all judgments alike, without regard to the grade or character of the courts rendering them.

3. CASE STATED.—Where plaintiffs had obtained a judgment at law from which the defendant had taken an appeal to the Supreme Court where it was reversed, for error in giving instructions for the plaintiff, but afterwards on rehearing, affirmed, and the defendant subsequently applied to the circuit court for an injunction against the enforcement of such affirmed judgment, alleging that such re-hearing and affirmance were procured by the fraudulent conduct of the adverse party, and were the result of a mistake of the trial judge in that case in endorsing certain instructions as having been given for the defendant, when in fact they had not been given for him, but for his adversary, by reason of which endorsement, the defendant was held to have waived the error made in giving such instructions, it was *held*, that such injunction was rightfully granted.

Walker & Walker, and *J. B. Dennis* for the relator, *Louis Houck*, *R. H. Whitelaw*, and *Smith & Kraushoff* for the respondent.

SHERWOOD, J., delivered the opinion of the court:

"This is an original proceeding in this court having for its object the issuance of a peremptory writ of *mandamus*, to compel respondent, who is

the clerk of the Common Pleas Court of Cape Girardeau to issue execution on a judgment formerly obtained in that court by Alex. J. P. Garesche against the president, directors and faculty of St. Vincent's College, afterwards affirmed in this court (76 Mo. 332) and which judgment, prior to such affirmance, had been issued by Garesche to relator.

After such affirmance, the defendants in that cause, by petition, in the nature of a bill in equity, filed in the Cape Girardeau circuit court, charging fraud on the part of Garesche in procuring on rehearing an affirmance of the judgment, which at first had been reversed, obtained on final hearing in the circuit court, a decree granting a new trial, the cause, in accordance with the opinion of this court as first delivered, and perpetually enjoining and restraining relator and Engleman, who were parties defendant in the circuit court, from issuing execution on the judgment of the Common Pleas Court. From this decree relator has appealed, and his appeal is now pending in this court.

These, in brief, are the facts presented in this case upon which relator, denying the sufficiency of respondent's return, but admitting by his motion, the truth of its recitals, asks that a peremptory writ issue.

1. *Mandamus* is not the proper remedy in this case. It is among the fundamentals of the law relating to the issuance of such a writ, that it will not be awarded but as an extraordinary remedy, only issuing where the law in the ordinary methods of its procedure is powerless to grant relief. It results from the principle that relief will not be granted an aggrieved party in this unusual way, when he may attain the same result by invoking another adequate legal remedy. In all such cases the courts uniformly refuse to exercise their extraordinary jurisdiction in behalf of a party who, in such a situation, seeks it. To rule otherwise than this, would be to allow a writ of *mandamus* to usurp the function of an appeal or writ of error. "Indeed, the influence in such cases would, if tolerated, speedily absorb the entire time of appellate tribunals in revising and superintending the proceedings of inferior courts, and the embarrassment and delay of litigation would soon become insupportable, were the jurisdiction of *mandamus* sustained in cases properly falling within the appellate powers of the higher courts. High Extr. Leg. Rem., §§ 15, 177, 180 and cases cited; Blecker v. St. Louis, etc., 30 Mo. 111; Potter v. Todd, 73 Mo. 101; Williams v. Judge, etc., 27 Mo. 225; State v. Howard Co. Ct., 39 Mo. 375; State v. McAuliff, 48 Mo. 112; Mansfield v. Fuller, 50 Mo 338; State of Missouri *ex rel.* etc. v. Lubke, decided last term.

And the principle announced in respect to refusing the writ of *mandamus* is not affected, nor the case changed because the appropriate remedy may involve inconvenient delay, or operate harshly or oppressively on the party complaining, or by reason of the fact that the judgment of the subordinate court is plainly erroneous, if the question passed upon by such court was properly within its jurisdictional powers. High Extr. Leg. Rem., § 189; *Ex parte* Perry, 102 U. S. 183.

2. But it is insisted that the Circuit Court of Cape Girardeau county had no jurisdiction in the premises, and that to correct the assumption on the part of that court of an unwarranted jurisdiction, a peremptory writ should issue. The doctrine is a familiar one that equity will interfere when a judgment is obtained or entered at law, through fraud, accident or mistake, and by all appropriate remedies will protect the rights and interests of the party who would otherwise be injuriously affected thereby.

This equitable interference manifests and enforces itself in an almost infinite variety of ways.

One of the most common methods of procedure is by enjoining the inequitable judgment; another by setting it aside. 3 Pom. Eq. Jur., § 1364; 2 Ib., §§ 836, 871; 1 Sto. Eq. Jur., § 252a; 2 Ib., § 876a; 2 Dan. Chy. Pr., 1624.

But a court of equity in granting injunctive relief, does not act upon the courts whose judgments it enjoins, nor claim any supervisory power over such courts or their proceedings. Its writ of injunction is not even addressed to those courts. It neither assumes any superiority over those courts nor denies their jurisdiction. It grants its restraining orders, which are directed only to the parties, on the sole ground that from certain equitable circumstances, of which the court of equity has cognizance, it is against conscience that the party inhibited should be allowed to force his claim or judgment. 2 Sto. Eq. Jur., §§ 875, 1571.

The action of a court of equity in such circumstances, is very succinctly stated in the case of Wingate v. Haywood, 40 N. H. 437.

Where it is remarked by the court that "if the judgment of a court of common law, having general jurisdiction, be rendered by accident or mistake, or through fraud, or any fact exists which proves it to be against conscience to execute the judgment, of which the injured party could not have availed himself in a court of law, or of which he might have availed himself at law but was prevented by fraud, accident or mistake, unmixed with any fault or negligence of himself or his agents, a court of equity may interfere by injunction to restrain the adverse party from availing himself of such a judgment. Fraud will vitiate a judgment, and a court of equity may declare it a nullity. Equity has so great an abhorrence of fraud that it will set aside its own decrees if founded thereon." And, "Where the judgment has been procured by artifice or concealment on the part of the plaintiff, and the court where the fraud has been perpetrated is not able to afford adequate relief, there a court of equity will take hold of the party who has committed the fraud, and will prevent his using the judgment to the

injury of his adversary." Tomkins v. Tomkins, 3 Stockt. (N. J. Eq.) 512-914.

Mr. Kerr says: In applying this rule, it matters not whether the judgment impugned has been pronounced by an inferior or by the highest court of judicature in the realm, but in all cases alike, it is competent for every court, whether superior or inferior, to treat as a nullity any judgment which can be shown to have been obtained by manifest fraud." Kerr on F. & M., 294.

In Boulton v. Scott, 2 Green, Chy. 231, it is declared that the jurisdiction of a court of equity to set aside a judgment for fraud extends to all courts, the grade or character of the court making no difference.

In the case of Wilson v. Montgomery, 14 Smedes and Marshall, 205, the court say that where a judgment is obtained in the lower court by a false return and affirmed in the Supreme Court, the affirmance in the Supreme Court will not make any difference in the result. And further that: "any other rule would destroy all confidence in judicial proceedings."

A ruling analagous to this was made in Georgia, where, owing to the fact that the certificate of the trial judge to the bill of exceptions was dismissed in the Supreme Court, and the judgment, in consequence of such dismissal, affirmed, it was held that equity as administered by one of the Circuit Courts of the State, would enjoin the collection of the judgment thus affirmed. Kohn v. Lovett, 43 Ga., 179.

I have cited the authorities on the question of fraud, &c., and of the jurisdiction which courts of equity take in such cases, taken when claim issues into judgment, and into the affirmance of the judgment by the highest appellate court, merely to show that the Circuit Court, in the present instance, which, generally speaking, is the only tribunal which is possessor of original chancery powers in this State, had the power to take cognizance of the matters stated in the petition for equitable relief filed in the Circuit Court by the president and directors of St. Vincent's College.

Of the sufficiency of that petition I do not purpose to speak, nor of the nature and propriety of the decree rendered thereon, for if the jurisdiction of the Circuit Court be conceded, such jurisdiction, however erroneously exercised that jurisdiction may be, cannot be questioned or controlled by *mandamus*. High. Ex. Leg. Rem. § 189.

Nor can the Circuit Court by entertaining jurisdiction in this instance, and proceeding to a final decree be regarded as wanting in proper respect for the judgment of this court. Its action in this regard only goes so far as this: That due unconscionable advantage has been gained in the original action by the plaintiff, which a court of equity will not permit his assignee to retain, and which advantage no powers but the flexible powers of a court of equity are able to wrest from his hands.

The peremptory writ will, therefore, be denied. All concur.

WEEKLY DIGEST OF RECENT CASES.

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INDIANA,	2, 3, 7, 13, 17
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TEXAS,	5, 9, 12, 14, 15

1. APPEAL. [*Lies Not.*]—*From Order Refusing to Vacate Order of Distribution.*—An order refusing to set aside and vacate a former order of distribution and settlement of the final account of an executor, is not appealable, under subdivision 3 of section 963 of the Code of Civil Procedure. [Citing Blum v. Brownstone Bros., 50 Cal. 293; Estate of Callahan, 60 Cal. 232; Estate of Dean, 62 Cal. 613.] *Estate of Lutz*, S. C. Cal., Sept. 24, 1885; 7 W. C. Repr. 507.

2. BANKS AND BANKING. [*Checks.*]—*Circumstances Whereby the Payee who by his Neglect does not Become Holder of a Check is Held not Liable for its Loss.*—The rule that the holder of a check must present it within a reasonable time does not apply to a case where a check was drawn and left with a third party to be delivered to the payee when he had performed certain conditions which he had promised to perform by a certain date, and his neglect to fulfil his agreement, does not cast any liability on him for a loss of the check. [The facts were that B applied to D & Co. for a loan, offering as security land which was incumbered, but informed them that the incumbrance could be removed. Later one of the firm of D & Co. visited B, and took a check for the amount, but finding the incumbrance unsatisfied agreed that B should execute notes, and he then delivered the check to C to be delivered to B when the incumbrance was removed, which B agreed to remove by July 5th. B neglected his agreement, and the bank on which the check was drawn failed on the 15th day of July. In considering the liability of B on the check the court says: "If appellee (B) had procured the satisfaction of the mortgage and received the check on July 5th it could have been collected from the bank before it closed. The holder or payee of a bank check must present it to the drawee within a reasonable time, and if he fails to do this and the bank on which it is drawn in the meantime becomes insolvent the drawer is released from liability, at least *pro tanto*, and the loss must fall on the holder. The delay under the circumstances of this case from the 5th to the 15th of July would be such a delay as would throw the loss on the holder of the check. But in this case the check was never delivered to appellee (B); he never had possession of it and never owned it, while by procuring the satisfaction of the mortgage, as he agreed, the check would have come into his hands and been his, yet his neglect in that regard did not bring about the failure of the bank, nor was such suspension the natural or probable consequences of appellee's conduct, and he cannot therefore be held liable for the loss or any part of it."] *Security Co. v. Ball*, S. C. of Ind., June 13, 1885.

3. ———. ———. [*Deposits.*]—*General and Special Deposits Defined—A Public Officer who Adds his Official Name to his own as Depositor is not Thereby a Special Depositor.*—Deposits in a bank are either general or special. On a special deposit the bank is merely a bailee and is bound according to the terms of the special deposit; but on a general deposit, without special agreement, the money

becomes the property of the bank, and the depositor has no longer any claim on that money. His claim is on the bank for a like amount of money. When the bank becomes insolvent its general depositors must be paid *pro rata*. Where a depositor was clerk of a court and had a deposit in bank in his own name, with the word "clerk" added, he is no more than a general depositor, and the addition of the word "clerk', does not change his status in that respect. *McLain v. Wallace*, S. C. of Ind., April 23, 1885.

4. BOUNDARIES. [*Division Fence—Estoppel.*]—*No Estoppel where Agreement is that Fence is Provisional.*—Adjoining owners of land, who erect a division fence along their supposed boundary line, under an agreement that, upon the discovery of the true boundary, the fence shall be changed so as to comply therewith, acquire no rights as against each other, by reason of the erection of such fence, either by prescription or estoppel, until the true boundary has been determined. [In the opinion by Belcher, Chief Com., it is said: "Counsel for appellant cite in support of their views: Sneed v. Osborne, 25 Cal. 626; Columbet v. Pacheco, 48 Cal. 397; Moyle v. Connelly, 50 Cal. 295; Biggins v. Champlin, 59 Cal. 113; Cooper v. Vierra, 50 Cal. 282; and Johnson v. Brown, 63 Cal. 39; but none of these cases are in point here. They hold, as was said in Johnson v. Brown, that 'where owners of adjacent parcels of land have occupied, adversely to each other for more than five years, their respective tracts by a division line, which each has recognized and acquiesced in as the true line during all of that time, either is estopped from afterward questioning it as the true line.' But here, as the court finds, 'The line of said fences was never settled and agreed upon by defendant and plaintiff or his grantors, as the true and correct boundary line of their respective tracts of land.' It is not necessary to notice the other points."] *Quinn v. Windmiller*, S. C. Cal., Sept. 24, 1885; 7 W. C. Repr. 518.

5. CONSTITUTIONAL LAW. [*Taxation — Railway Companies.*]—*Occupation — Tax upon Sleeping Car Companies, when not Uniform.*—A statute which imposes a tax upon the occupation of owning and running sleeping cars by other persons or associations than railway companies, but which exempts railway companies from the payment of such a tax, is contrary to a constitutional provision that "all occupation taxes shall be equal and uniform upon the same class of subjects," it is hence void. *Pullman Palace Car Co. v. State*, S. C. Tex., Austin Term, 1885; 1 Tex. Ct. Repr. 321.

. CREDITOR'S BILL. [*Fraudulent Conveyance.*]—*Cannot Subject Profits of Business of Fraudulent Donee.*—For the purpose of defrauding his creditors a debtor gave his stock of goods and his business to his wife, who had been empowered by a decree in equity to trade as a *feme sole*. *Held*, that while the creditors could pursue the goods and subject them in the wife's hands, they could not subject the profits of the business made by her while conducting it. [In the opinion of the court by Bowden, J., the question is thus reasoned. "The gift of a mere business which the debtor will not continue, and which the creditor cannot compel him to continue, is not fraudulent. It is no more than a determination not to work any longer for the benefit of creditors. What was the business which Morel gave his wife? Was property liable to be seized for debt, part of that which was given? There is no such complaint. Had he acquired a good will? Though valuable, it could not be taken for debt. The reputation of the house for good work would probably induce customers to continue their patronage; but that could afford no reason why the debtor should not quit work, if he wishes to do so, or why one who succeeds to its benefits should be made to pay for his debts. If it had been alleged and shown that the appellant was in fraudulent collusion with her husband, permitting her name to be used to cover his business, then it would be clear that the profits should be considered his and liable to his debts. But, it being conceded by the assailant that the wife carried on the business and made the money, it cannot be subjected by his creditors on the ground that he made up his mind that he would not work for them any more, and turned the business over to his wife, legally capable of carrying it on; there being no pretense that she has any property, or the proceeds of any property, that he ever had any interest in. If she owes him for services, she must be pursued as a stranger would be; she can be held as garnishee to account to the creditor of her husband for all she owes; but the fact that she has her husband in her service does not give him any interest in the profits. There is neither allegation nor evidence what, if anything, she owes him on that account."] *Morel v. Haller*, Ky. Superior Ct., June 3, 1885; 7 Ky. Law Repr. 122.

7. CRIMINAL PROCEDURE. [*Trial by Jury*]. *Defendant cannot Waive his Right to Trial by Jury Unless Expressly Authorized by Statute.*—§ 13 of the Bill of Rights in the State constitution provides "that in all criminal prosecutions the accused shall have the right to a public trial by an impartial jury in the the county in which the offense shall have been committed," etc. The defendant's right to such trial is his personal and constitutional right, which he cannot be deprived of. He cannot waive such right unless such waiving is expressly authorized by statute. *Wartner v. State*, S. C. Ind., May 12, 1885.

8. DEBTOR AND CREDITOR. [*Compromise*]. *Setting Aside in Equity for Fraud.*—1. In an action by a creditor to set aside, on the ground of fraud, a compromise made by a debtor, after his assignment, and accepted by the creditor, and to recover the full amount of the debt, it must be proved that defendant or his attorneys had actual knowledge as to what would remain of the debtor's assets, after paying the preferred creditors and the amount of the compromise. 2. To be entitled to have set aside the compromise of a debt which the creditor has accepted, such creditor must show himself to have been, at the time of the compromise, without knowledge of the fact that the debtor was financially able to make a larger payment. 3. In arranging a compromise between them, the debtor and creditor have the right to use each his own skill, foresight, and knowledge, and the debtor is not bound to give to the creditor, at the time, the full benefit of what he knows of his own affairs. 4. A compromise having been entered into between a debtor and creditor after a judgment upon the debt recovered, and while a writ of error from such judgment was pending, before such compromise can be set aside in favor of the creditor, the amount received by such compromise must be returned with interest, and the debtor be

restored as far as may be in position to prosecute his writ of error. *Graham v. Meyer*, N. Y. Ct. App., April 14, 1885; 1 N. E. Repr. 143.

9. DURESS. [*Per Minas.*] *What Threats amount to.*—To constitute duress by a threat of imprisonment for a supposed crime, there must be a threat importing an illegal or wrongful imprisonment, or a resort to a criminal prosecution for an improper purpose or wrongful motive, accompanied with such circumstance as would indicate a prompt or immediate execution of the threat. [In the opinion of the court it is said by Watts, J.: "To constitute duress by a threat of imprisonment for a supposed violation of the criminal law, it must be a threat importing an illegal or wrongful imprisonment, or else a resort to the criminal prosecution for an improper purpose or wrongful motive. The fear of imprisonment which amounts to duress, is that of an illegal imprisonment, or imprisonment under such circumstances as if carried into execution would amount to duress by force. Davis v. Luster, 64 Mo. 43; State v. Davis, 79 N. C. 603; Whitfield v. Longfellow, 13 Mo. 146; Eddy v. Herrin, 17 Mo. 338; Harmon v. Harmon, 61 Mo. 229; 2 Greenl. Ev., §§ 301-2; 1 Parsons on Contracts, 393; Alexander v. Pierce, 10 N. H. 497; Landa v. Obert, 45 Texas, 548. It seems, also, to be well settled that for threats of imprisonment to constitute duress, that they must be accompanied with such circumstances as would indicate a prompt or immediate execution of the threats. Bane v. Detrich, 52 Ill. 21; Lester v. U. M. Co., 1 Hun. (N. Y.) 288; Plant v. Gueen, Woods (C. C.) 372. As was remarked by Mr. Justice Agnew in Miller v. Miller, 68 Penn. St. 493, 'The constraint which takes away free agency and destroys the power of withholding assent to a contract, must be one which is imminent, and without immediate means of prevention; and be such as would operate on the mind of a person of a reasonable firmness of purpose. * * * Nor is there a duress *per minas* in equity, which does not exist at law.' And as was said in Harmon v. Harmon, *supra*, 'There must be imprisonment, or a fear of it, sufficient to overcome the will of a man of ordinary firmness and constancy.' The rule to be deduced from the great weight of authority is, that mere threats of a criminal prosecution is not sufficient, but there must be a reasonable ground for creating an apprehension in the mind of a man of ordinary courage and firmness, that the threat will be carried into execution, and it must also appear that the threats operated directly upon the mind of the party, so as to overcome his will."] *Landa v. Obert*, S. C. Tex., Austin Term, 1885; 1 Tex. Ct. Repr. 346.

10. ELECTION—*Mistake in Ballots do not Vitiate, when.*—A candidate for the office of supervisor for the first district of a county, is entitled to have counted for him ballots which, on their face, showed that he was voted for as supervisor for the second district, when it appears, from all the circumstances of the case, that such ballots were intended for him. *Inglis v. Shepherd*, S. C. Cal., Sept. 24, 1885; 7 W. C. Repr. 512.

11. EQUITY JURISDICTION. [*Injunction—Taxation.*] *Jurisdiction to Enjoin Sale for Taxes which have been Paid.*—Equity has jurisdiction to restrain the sheriff from proceeding to sell property seized by him for taxes already paid. [In concluding the opinion of the court, Pryor, J., says: "The inadequacy of the remedy at law, or the entire absence of any other remedy, is of itself sufficient grounds for asking the chancellor to interfere, and the mere fact that the tax-payer is required to apply to the county court to have his tax list corrected, will not warrant the conclusion that the chancellor is thereby deprived of all power to interfere, when the property of the citizen has been seized or is about to be sold for an illegal tax or for a tax demand that has already been satisfied. The demurrer should have been overruled and is remanded for that purpose."] *Nolan v. Jackson*, Ky. Ct. of App., May 28, 1885; 7 Ky. Law Repr. 119.

12. EVIDENCE. [*Private Records.*]—The record book of a Masonic Lodge is admissible to prove that a deed, executed by the officers of the lodge, had been adopted by the lodge. [The objection was based upon two grounds: 1. Because it was not produced by the proper authority or custodian. 2. Because it was not proven by the person shown to be the proper custodian. The court say: "It was proven that there was no secretary, and the book was produced from the lodge room by the presiding officer, the acting secretary being sick. In our opinion the evidence was properly admitted. As a general rule books of this sort, which are not required by law to be kept, are not admissible in evidence to prove facts which are susceptible of proof in the ordinary way. For instance, it was held that an Odd Fellow's minute book was not admissible to prove the act of a member. Ins. Co. v. Schneck, 94 U. S. 593; 1 Wharton Ev., § 639. But the book was produced in the present case, not to prove extraneous facts, but to show the action of the body itself; and of that fact it was the proper evidence."] *Leach v. Dodson*, S. C. Tex., Austin Term, 1885; 1 Tex. Ct. Repr. 330.

13. LIQUOR LAWS. [*Indiana Statute.*] *A Statute Prohibiting sales of Intoxicating Liquor between the hours of 11 o'clock p. m. and 5 o'clock a. m. valid.* A statute prohibiting the sale of intoxicating liquor between the hours of eleven o'clock p. m. and five o'clock a. m., is a valid exercise of the police power vested in the Legislature by the constitution and it is not void. [The Court says: "It is clear to our minds, both upon reason and authority, that the statute is a valid exercise of the police power vested in the Legislature. In Morris v. State, 47 Ind., 503 it was assumed, without question, that the statute restricting the sale of liquor between prescribed hours was valid and that it was within the power of the Legislature to prohibit the sale on Sunday, on election days, and on legal holidays. We have a great many cases through our reports holding statutes prohibiting sales on such days valid, and the principle is the same in those cases as in this, for the undergirding principle of all these cases is, that the legislature may regulate the retail liquor traffic." Citing Harrison v. Lockhart, 25 Ind., 112; McAlister v. Howell, 42 Ind. 15; *Cooley Const. Lim. 720n;* Bertholf v. O'Reilly, 74 N. Y., 509.] *Hedderick v. State*, S. C. of Ind. May 12, 1885.

14. NEGLIGENCE. [*Master and Servant.*] *Mail Agent not Fellow Servant of Railroad Employe.*—A mail agent on a railway train is not a fellow servant with the employees of the company, and if killed by the negligence of the company's servant's, his wife may recover damages. [In the opinion of the Court by Delany, J. it is said: "In Pennsyl-

vania these mail agents are placed upon the same footing of employees; but this is by virtue of an act of the Legislature of that State. The case of R. R. Co. v. Price (96 Penn. St., 256) is directly in point. In that case the mail agent on the train was killed by a collision, and the suit was brought by his widow. It was held she could not recover. The court, however, rests its decision on the statute. The court say: 'The effect of the act of Congress is to make his position on the car a lawful one. Being lawfully on the train a recovery might possibly have been had for his death upon the duty to carry safely. Collett v. Railway Co., 16 Q. B., 984, and Nolton v. R. R. Co., 15 N. Y., 444. go to this extent. But here the act of 1868 comes in and declares that persons employed upon the road shall have only the rights of employees of the company.' The same case is published in 1 Am. and Eng. Railway cases, p. 236. In a note on page 239 the editor says: 'The question in the present case was *res integra*. The authorities cited and relied on by the court below for holding the plaintiff's decedent a passenger were: Collett v. R. R. Co., 162 B., 984; Nolton v. R. R. Co., 15 N. Y., 444; Yeomans v. S. Nav. Co., 44 Cal., 71; Blair v. R. R. Co. 66 N. Y., 313; Hammon v. R. R. Co., 6 Rich. (S. C.), 130, and Penn. R. R. Co. v. Henderson, 1 Smith, 315. These cases may be admitted to establish the fact that, in the absence of the act of Assembly, the plaintiff would have been entitled to recover. They establish, however, no more. In none of them was it specifically decided that such a person as plaintiff's decedent was a passenger as distinguished from a person engaged or employed on or about the road * * or on or about any train or car * * thereon.' In the subsequent case of Seybolt v. R. R. Co. (95 N. Y., 562) it was held that a railroad corporation owes the same degree of care to mail agents riding in postal cars in charge of the mails as they do to other passengers. The court in commenting upon the case of Price, quoted above, use this language: 'The opinion in the case of R. R. Co. v. Price not only does not conflict with the doctrine of these cases, but cites with approval the Nolton case. The question in that case was upon the construction to be given to the word 'passenger' as used in the act of April 4, 1868, of the laws of Pennsylvania, and it was held from the act that the Legislature intended to exclude postal agents from the class therein designated as passengers * * *.' Whatever may be the precise *status* of a postal clerk on a railroad train, we think it may be fairly concluded that he would be entitled to recover of the company for injuries resulting from the negligence of its employees."] *Houston, &c., R. Co. v. Hampton*, S. C. Tex.. Austin Term, 1885: 1 Tex. Ct. Repr. 337.

15. OFFICE AND OFFICER. [*Resignation.*] *When Resignation Vacate Office without Acceptance.*—When an officer delivers his unconditional resignation to the proper authority to take effect at once, it is effectual without acceptance, and the office thereby becomes vacant. [In the opinion of the court by Willson, J., it is said: "There can be no doubt that a civil officer can resign his office at pleasure. [U. S. v. Wright, 1 McLean. 509.] But the question is: When does the resignation take effect so as to create a vacancy? In Williams v. Fitts (49 Ala., 402) it was said: When an officer transmits an unconditional resignation which he intends shall reach the officer or authority intended to receive it, he resigns. He has given formal expression to his will and sent away a notice of it to whom it may concern. There is nothing more for him to do. Nobody else is authorized to accept it, It needs no acceptance. [Citing Nourse v. Clark. 3 Nev., 566; People v. Porter, 6 Cal., 26.] In U. S. v. Wright, *supra*, it was said: 'It is only necessary that the resignation should be received to take effect, and this does not depend upon the acceptance or rejection of the resignation.' In the case of The People v. Porter (6 Cal., 26), it was held that the tenure of an office depends upon the will of the incumbent during his term, and to render his resignation effectual it was not necessary that it should be accepted. But upon this point the authorities are not uniform. In the State v. Boecker (56 Mo., 17), it was held that a resignation is not in general complete until it has been accepted by the authority capable of receiving it, with the knowledge and consent of the person resigning. But in that case it is to be observed the resignation was to take effect *in futuro*, and in such cases a different rule seems to obtain from that which governs an unconditional resignation to take effect at once. In other States it has been held that when a written resignation is tendered to the proper authority and filed by him without objection, the office becomes vacant. Gates v. Delaware, 12 Iowa, 405; State v. Hauss, 43 Ind., 105. And in another State it has been held that a resignation received by a court and filed by the clerk is an acceptance of the resignation without an entry of an order. Pace v. People, 50 Ill., 432. We conclude from the decisions of other States which we have examined, that the correct rule is that when an officer delivers his unconditional resignation to the proper authority to take effect at once, it is effectual without acceptance, and the office thereby becomes vacant."] *Byers v. Crisp*, Tex. Ct. of App., 1885; 5 Tex. Law Rev. 584.

16. RAILWAY COMPANIES. [*Trespass upon Realty.*] *Liability for Injuries to Adjacent Lands.*—A railway company so constructing its crossing of an intersecting turnpike as to cut off the use of the pike as a means of egress and ingress to the adjacent lands or causing water to run or stand on such lands, is liable for the resulting damages. [In the opinion of the court by Ward, J., it is said; "It seems to be now well settled by a great number of well-considered cases in this State that the owner of property abutting on a street or public way cannot recover for consequential damages resulting from the use of the road for the public good, no matter whether the improvement is made by the public, or by a railroad company by authority of law, to meet the public demand for transportation —provided the improvement or change is made in the road with care and skill. Keasy v. City of Louisville, 4 Dana, 154; Wolfe v. Covington & Lexington R. R. Co., 15 B. Monroe, 404; Louisville & Frankfort R. R. v. Brown, 17 B. Monroe, 763; Louisville & Nashville R. R. v. Hodge, 6 Bush, 141; J. M. & I. R. R. Co. v. Esterle, 13 Bush, 671. But the same cases, without exception, recognize the principal of absolute or vested rights in the owners of the abutting property, and when they are encroached upon or actual injury is done thereto, then, unless there is condemnation for public use by due process of law, there is claim for damage to the extent of that injury. If the corporation making the improvement keeps entirely within the public way, doing no injury except remotely, then there is no redress: but if it obstructs the power to enjoy by "preventing ingress or egress," or "causes water to run or remain upon it, or renders the property less salubrious," then

the injury is direct and actionable."] *Louisville, &c., R. Co. v. Finley*, Ky. Superior Court, [May 6, 1885; 7 Ky. Law Repr. 129.

17. RECEIVER.—*Court has no jurisdiction to Appoint until there is an action pending and Appearance of Defendant*. Neither the court in term nor the judge in vacation can acquire jurisdiction to appoint a receiver of a partnership until there is an action pending between the partners and an appearance of the defendant according to law. [In this case with his petition for a receiver one partner filed a paper signed by the other partner admitting the allegations of the petition. The other partner did not appear and no process was served. On the next day a supplemented complaint was filed setting forth that the partners were owners of real and personal property which they would turn over to a receiver, with this was filed the consent of the other partner. In considering the validity of the receivership the court says: "Under the statute a receiver may be appointed by the court or judge, in vacation in actions between partners. The appointment may be made before answer, provided a special necessity therefor is shown to exist. High v. Receivers, 105, 106, unless under extraordinary circumstances, as where the defendant had left the State to avoid process, or the like, a court cannot get jurisdiction to appoint a receiver until after serviee of process and notice of the motion. Whitehead v. Wooten, 43 Miss., 523, Edwards on Receivers, 13, 14. Where necessity is shown the application may be entertained when the action is commenced, which is when process is issued or an appearance to the action is entered in the manner recognized; but as the appointment of a receiver is a mere incident to the suit, neither the court in term nor the judge in vacation can acquire jurisdiction to appoint a receiver until there is an action pending. Brinkman v. Ritzinger, 82 Ind., 358; Dale v. Kent, 58 Ind., 584; Bank v. Kent, 43 Mich. 292. The action pending is the principal thing. It may well be doubted whether in any case jurisdiction to appoint a receiver could be acquired by a judge at chambers, by the voluntary appearance of the defendant of such action, where no process had issued and no appearance was entered in the case, In this case no action was pending and John S. Harrison (the defendant) did not appear in person or by attorney. The signing and delivering to the plaintiff the papers mentioned and the presentation by him of them to the judge did not constitute an appearance by the defendant either to the action or proceeding before the judge. Even if it were conceded that a receiver might in a case be appointed before the action pending, where the defendant appeared before the court or judge, the appearance of the defendant must have been in a manner which is recognized by law as an appearance. No such appearance was entered in this case. A receiver cannot be appointed in an *ex parte* proceeding. Hardy v. McClellan, 53 Miss., 507.] *Pressly v. Harrison*, S. C. of Ind., May 16, 1885.

QUERIES AND ANSWERS.

[*Correspondents are requested to draw up their answers in the form in which we print them, and not in the form of letters to the editor. They are also admonished to make their answers as brief as may be.—Ed.*]

QUERIES.

20. If A is traveling from the north part of the State of Missouri to the southern part, and carrying a large amount of money for the purpose of buying cattle, and for his protection carries a pistol concealed, will he be liable, if indicted, under § 1274 Rev. Stat. for carrying concealed weapons? Or does § 1275 exempt such an one? Please cite authorities. M. & P.
Hartville, Mo.

21. On July 1st, 1884, I promise to pay G. Jarlism or bearer fifty dollars without interest. JNO. SMITH.
What interest, if any, is collectible on the above note in September, 1885, in Iowa? R. C.

22. Real estate of a bankrupt, subject to a mortgage executed by him, and to the lien of a judgment against him junior to the mortgage, was sold and conveyed by the bankrupt's assignee to A, subject to both liens. The real estate was afterwards sold and conveyed by the sheriff to B, under an execution on said judgment. A then conveyed his interest under the assignee's sale to the bankrupt. Is the bankrupt entitled to subrogation, to the rights of the original mortgagee as against B's title under the judgment lien? ***

22. O, on a bill charging cruelty, obtained a decree of divorce from her husband. The decree awarded the custody of a six year old daughter to O. O did not ask for alimony, and the decree is silent as to the expenses of rearing the child. The child's shoulder was accidentally broken after the divorce, and while the child was in the custody of O. Can W, a surgeon, who treated the child professionally on account of the broken shoulder, recover of the divorced husband of O, the father of the child? The parties reside in Illinois, and the divorce was obtained there.
Dixon, Ill. D. D. O'BRIEN.

23. A railroad built twenty-five years ago crosses a brook by means of a small stone culvert, which ordinarily affords outlet sufficient to carry off the rainfall. When the rainfall is excessive the waters of the brook cannot escape, and, being dammed up, overflow H's land to his injury. This has been the state of things for twenty-five years, the former owners of H's land having never taken steps to remedy the evil. H has owned the farm about three years, having neither known nor thought of this water trouble when he purchased. Can he recover of the railroad company? Will the fact that the incumbrance of the overflow existed when he purchased defeat his recovery? The *situs* is in Tennessee, where the rule is that "all lands are of necessity burthened with the servitude of receiving and discharging all waters which flow down to them from lands on a higher level." "This rule embraces rain and surface water, as well as running streams;" and "a benefit accruing is an essential element in an easement." Per Turney, J., 11 Lea, 382.

24. Section 4940 of Rev. Stat. of Mo. 1879, confers power upon cities of the fourth class, by ordinance, to tax merchants, peddlers, etc. The same section also provides for the levy and collecting of a license tax on certain classes of trades and avocations, but does not include peddlers. Query: Has a city of the fourth class power, by ordinance, to levy and collect a license tax *per diem*, that is, compelling peddlers to pay a

certain amount for each day they shall follow their avocation within the city limits, and make the violation of the ordinance a misdemeanor punishable by fine, or should the ordinance be for the levy and collection of an *ad valorum* tax?

X. Y.

Bethany, Mo.

JETSAM AND FLOTSAM.

THE LAND TRANSFER SYSTEM IN NEW ZEALAND.—A correspondent in New Zealand writes: In New Zealand we have a system of land transfer based upon the Torrens system. On signing an application to have one's land brought under the Act, with a declaration of the truth of the statements contained in such declaration, and upon handing to the registrar all the deeds one actually has in one's possession, certain notices are advertised, and, if no caveat is lodged, a certificate of title issues, absolute in the first instance. The fees payable often make a transaction more expensive than under the old system. Where part only of land comprised in a certificate is sold, the purchaser must obtain, and pay £1 for, a new certificate, and the vendor must also do the same as regards the piece remaining unsold, unless he chooses to leave his certificate "partially cancelled," in the registrar's office until the remaining land is sold. On a small transaction the fees (exclusive of the *ad valorem* stamp duty) would be: Transfer form, 1s.; searching against caveats, etc., 2s.; registering transfer, 10s.; purchaser's new certificate, £1; vendor's new certificate, £1; total, £2 13s. The fees out of pocket (exclusive of stamp duty) on a small sale, under our old system (with registration of deeds), would be about 17s. Again, where a large number of sections are included in one certificate, and (as is allowed under the system) a sale plan is also deposited in which one "lot" comprises parts of two or more "sections," and it becomes necessary to frame a description of part of such a lot, the process is often very troublesome. At the same time, the system is popular here, and auctioneers generally conclude their advertisements with the words, "title—land transfer." Vendor and purchaser can come into a solicitor's office at ten in the morning, give instructions, and come again in the afternoon and complete. I have carried through, under this system, about twenty mortgages a month for a building society, in addition to other work which pretty fully occupied my time before undertaking the society's business. The responsibility is very small, seeing that the title has not to be tested. I wish, however, to explain more fully than I have yet seen explained what is meant by the "indefeasible" title. Some persons may be surprised to learn that there are limits to this indefeasibility of title. I will briefly state the exceptions. 1. The case of a person adversely in actual occupation and rightfully entitled at the time of the issue of the certificate, and (as regards any certificate issued to any person claiming under the holder of the original certificate) continuing in such occupation at the time of the issue of any subsequent certificate. 2. Ejectment will lie against a person obtaining a certificate through fraud, but not against his *bona fide* transferee for value. 3. Ejectment will also lie in the case of too much land being included in the certificate through misdescription of land or its boundaries, with the like saving of the *bona fide* transferee for value. 4. In case of their being a prior certificate for the same land. 5. The certificate of title is not conclusive as to easements. Persons losing their land by the operation of the system have claims upon the "Assurance Fund." Very few claims have arisen in the colony and consequently the fund has grown large. The great boon of the system is in case of titles under the old system which are defective, but yet fairly good holding titles. It is the commonest thing for a purchaser to make a requisition which the vendor cannot comply with, except by bringing the land under the land transfer system, which thus becomes a refuge for "destitute" titles. It wants a very bad title to be refused. The government seeks to make the system popular, and deprecates technical objections by the examiners of titles. Land brokers (generally being auctioneers or estate agents also) are allowed to transact business under the system. My experience is, that in small country parts they materially interfere with the solicitor, but not in the principal towns. The same legal knowledge is required to prepare a mortgage or lease under the land transfer system, as under the old system; the supplying of forms cannot overcome the want of this knowledge. Indeed, many moot points arise out of the working of the Act in cases evidently not foreseen.

Only absolute dealings can be registered. A favorite (and also a very dangerous) mode of buying land here is for an agreement to be signed providing for the payment of the purchase money and interest thereon by instalments over a few years, and then for a title to be given. This transaction can only be recorded in the form of a caveat, with copy agreement annexed. If any person applies to register any document during the subsistence of the caveat, fourteen days notice is given to the caveator, and if he takes no step his caveat lapses. He may be absent and never receive the notice, and, when he is willing to let in some dealing that does not injuriously affect him, he has to let his caveat lapse and then lodge another, and so on. There is, perhaps necessarily, an entire absence of any elasticity about the working of the system.

I do not write the above remarks in the spirit of an advocate either of the old or new system, but only to give information. Neither system, as carried out in this colony, has much to commend it to a lover of the art of conveyancing, and, from what I can gather of legislation at home, I should not wonder if a similar remark is not often made there. The transfer and pledge of land, however, ought, in my opinion, to be withdrawn from the domain of conveyancing, regarded as an art. This leaves such documents as settlements, deeds of trust, wills and contracts, which are of a character and have incidents essentially in harmony with the spirit of the age, and (as far as can be foreseen) with that of the conveyancing of the future. I used the word pledge advisedly, for I should observe in conclusion that under the Torrens system the legal estate does not pass to the mortgagee. What complications as to priorities and otherwise would be avoided could a short act be passed at home prohibiting the conveyance of land for the purpose of securing a debt.—*Law Times* (London).

A NOVEL SAUSAGE MACHINE.—The enemies of capital punishment in Switzerland have just achieved what they call a "victory of progress." They have succeeded in preserving alive a wretch who tortured and killed his daughter. As there have been no executions in Switzerland for several years, no one knew how to do the job, and no guillotine could be procured; of the only two available, one would not work and the other was in use as a sausage machine. So the brute was reprieved, and "civilization triumphed," just as it does in this State. If we had a few more cases of judicial execution there would be less murder and lynching.—*Kansas Law Journal.*